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NO._____

IN THE
SUPREME COURT OF THE UNITED STAT
OCTOBER TERM, 1980

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
TEXAS EDUCATION AGENCY
Appe

VS.

UNITED STATES
Intervenor-Ap

AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
App

On Appeal From The United States Court O
Appeals For The Fifth Circuit

APPENDIX TO THE JURISDICTIONAL STATEMENT

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SUBJECT INDEX

Opinion of Mr. Justice Powell on Application To Vacate Stay .....

Order of Court of Appeals for the Fifth Circuit .....

Notice of Appeal .....

Amended Notice of Appeal .....

Order of District Court .....

Opinion of District Court .....

SUPREME COURT OF THE UNITED

No. A-179

Certain Named and Unnamed Noncitizen Children and Their Parents, Applicants v. State of Texas, *et al.*	* * * * * *	On Applic Vacate

[September 4, 1980]

Mr. Justice Powell, Circuit Justice.

This is an application to vacate an ord States Court of Appeals for the Fifth Cir pending appeal an injunction entered by States District Court for the Southern Texas. The District Court held that § 2 Texas Education Code, which prohibits th funds to educate alien children who are no mitted" to the United States, violates the l tion Clause of the Fourteenth Amendment enjoined state education officials from public education to any child, otherwise el the child's immigration status. The Di denied the State of Texas's motion to sta tion, because the Court found that a substantially harm the plaintiffs and would public interest." The Court of Appeals, quent motion of the State, stayed the in ding appeal without opinion.

[1]Another Federal District Court in Texas had prev § 21.031 violates the Equal Protection Clause as app Independent School District. *Doe v. Plyler*, 458 F Tex. 1978), *appeal pending*, No. 78-3311 (CA5).

Plaintiffs below, and applicants school-age, "undocumented" alien been denied a free public education 21.031, and their parents.[2] Preci number of children in Texas e description is impossible. The S there are 120,000 such children, b rejected this figure as "untenable' modest estimate of 20,000 c documented children have not bee the United States through establ migration. None, however, is pre deportation proceedings, and mar found, are not deportable under laws. The District Court conclude jority of the undocumented chil become permanent residents of thi

This case came before the Distri a consolidation, by the Judicial P Litigation, of lawsuits filed in all f in Texas against the State and st challenging the validity of § 21.03 a similar statute. The Court foun tively denied an education children. Although they could att ment of tuition, the Court further ment is beyond the means of their the Equal Protection Clause a residing in the United States, aliens. It recognized that no pre directly supports this ruling, an analogous rulings of this Court, *Diaz*, 426 U.S. 67, 77, (1976)(Due P to aliens unlawfully residing in th precedents in lower courts, *see* F.2d 1023, 1025 (CA2 1975) (dict

[2]The United States intervened on the has filed here a statement in support of t stay.

Court found guidance in the languag
tection Clause, which extends prot
within a State's jurisdiction, and rul
which purports to act on any person
State is subject to scrutiny under the

The District Court then determin
statute was subject to strict scruti
paired a fundamental right of access
education. It sought to distinguish *S*
Board v. Rodriguez, 411 U.S. 1 (197
the Constitution does not protect a
at least beyond training in the basic
the exercise of other fundamental rig
and free expression. *Id.*, at 29-39. T
that § 21.031 established a complete
tion for the plaintiff children, and th
tion reserved in *Rodriguez* of whetl
damental right under the Constit
education. It stressed that an affi
this question would not involve the
overseeing the quality of educatio
States, an involvement condemned
plying strict scrutiny, the court
violative of the Equal Protection Cla
not justified by a compelling state i
explicitly so holding, the court also in
hold the statute unconstitutional ev
tional basis scrutiny or merely requi
substantially related to an important

II

"The power of a Circuit Justice to
well settled." *New York v. Kleppe*, 4
(1976) (Marshall, J., in chambers). Se
83 S.Ct. 10, 9 L. Ed. 2d 43 (19
chambers). The well-established prin
Circuit Justice in considering an ap
judgment entered below are equall
considering an application to vacate

"[T]here must be a rea
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underlying issue suffici
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Times-Picayune Publishing
U.S. 1301, 1305 (1974) (Po
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Respect for the judgment
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ajudication of the merits, b
Circuit Justice should not
weightiest considerations, i
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it." *O'Rourke v. Levine*, 8
615, 616 (1960) (Harlan, J.
supporting this reluctance
are plain: when a court of
the merits of a controversy
order invades the normal r
provide for the orderly
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justified solely because he
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This is the exceptional
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reasonable probability that
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Court's holding that the Eq
plied to unlawful aliens raises
stitutional significance. It al
tional problem: the number o
our country has risen dramat
terms, the case presents a ch
tion of Texas public schools o
residents. The decision of th
resolve satisfactorily the imm
overarching question of the
Protection Clause to unlawful
main.

It is more difficult to say wh
probability that a majority of
agree with the District Cour
Diaz, supra, upheld the pow
ment to make distinctions be
the provision of Medicare be
the classification violated the
Court's resolution of the cas
gress's necessarily broad pow
migration and naturalization
that "equal protection analy
different considerations beca
ship between aliens and the
aliens and the Federal Go
84-85. The District Court
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The State does not
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vacated. The primary
Agency is to provide
school districts. See
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the State allege that i
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submits that its total
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[3]The State argues that s
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[4]Applicant
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IN RE:
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Appeal from

Before POLIT
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[Filed Feb. 23

NO 80-1807

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
TEXAS EDUCATION AGENCY
Defendant-Appellants

VS.

UNITED STATES
Plaintiff-Intervenor-Appellee
AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
Plaintiffs-Appellees

NOTICE OF APPEAL[1]

TO THE HONORABLE COURT OF APPEALS:

Notice is hereby given that the State of Texas and Texas Education Agency by and through their attorney, Richard Arnett, Assistant Attorney General, file this their Notice of Appeal from the judgment of the United States Court of Appeals for the Fifth Circuit entered February 23, 1981, which judgments summarily affirmed the District Court judgment in this cause which held Section 21.031 (a) - (c) of the Texas Education Code unconstitutional.

---

[1]Filed March 2, 1981.

Respectfully submitted,

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BAR NO. 01333300

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CERTIFICATE OF SERVICE

I, Richard Arnett, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the foregoing Notice of Appeal has been served upon all parties by placing same in the United States mail, certified, return receipt requested, addressed to Mr. Antonio Guajardo, Centro Para Inmigrantes de Houston, Inc., 2314 Cochran St., 2nd Floor, Houston, TX 77009;

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Grain Street, P. O. Box 2629, Longview, Texa
Mr. Richard A. Peebles, Reid, Strickland, G
Elkins, P. O. Box 809, Baytown, Texas 77
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Assistant Attorney Ge

NO 80-1807

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
TEXAS EDUCATION AGENCY
Defendant-Appell

VS.

UNITED STATES
Plaintiff-Intervenor-App
AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
Plaintiffs-Appe

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS, HOUSTON DIVISION

AMENDED NOTICE OF APPEAL[1]

---

[1]Filed March 13, 1981.

TO THE HONORABLE COURT OF A

Notice is hereby given that the Stat
Texas Education Agency, by and th
torney, Richard Arnett, Assistant At
pursuant to 28 U.S.C. 1254(2), file this
Appeal to the United States Supreme
judgment of the United States Court of
Fifth Circuit entered February 23, 198
ment summarily affirmed the district co
this cause holding Section 21.031(a)-(c
Education Code unconstitutional.

Respectfully s

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Executive Ass
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CERTIFICATE OF SERVICE

I, Richard Arnett, Assistant Attorney
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the foregoing Amended Notice of Appeal h
ed upon all parties by placing same in the U
Mail, certified, return receipt requested, ad

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Longview, Texas 75601

Mr.
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UNITED STATES DISTRI
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HOUSTON DIVIS

IN RE	§
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ALIEN CHILDREN	§
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EDUCATION	§
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ORDER

In accordance with the Memor
entered this date, the court hereby

The plaintiffs' request for a decl
GRANTED. Section 21.031(a)-(c) o
tion Code violates the equal prote
fourteenth amendment to the Unit
tion.

IT IS FURTHER ORDERED
sioner of Education, his employees,
assigns and all those acting in con
ENJOINED FROM denying th
Available School Fund to any child
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IT IS FURTHER ORDERED
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The Clerk shall file t
counsel for all parties wit

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UNITED STATES DISTRICT
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IN RE	§
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ALIEN CHILDREN	§
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I. INTRODU

This case concerns what has e
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schools no longer exist merely to
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Children are the basic resour
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In this day we must examine
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At issue is a statu
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21.031 (Vernon 198
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In September, 1
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On January 11, 198
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Plyler demonstrate that the *Plyler* case involved only the constitutionality of section 21.031 as applied by the Tyler Independent School District.[9] After the court entered its judgment in *Plyler*, the State moved to reopen the case to present additional evidence.[10] Judge Justice, in denying the State's motion, stated that there was no need to re-open the case since "the amended complaint does not state a cause of action against any school district other than the Tyler Independent School District and since this court intends to order relief only against the Tyler Independent School District. . . ." *Doe v. Plyler*, No. TY-77-261-CA (E.D. Tex. Sep. 14, 1978). While it is true that the State offered some evidence in *Plyler* that related to the state-wide impact of the statute, the court's order in *Plyler* did not decide that issue. Much emphasis was placed on the small number of undocumented children in the Tyler Independent School District. *Plyler*, *supra*, at 573, 577 & 590. The issue in this multidistrict litigation is much broader. Although the two cases share a common inquiry, the issue considered in *Plyler* is not identical to that considered in this case.

In addition, even if the issue of the state-wide constitutionality of the statute was decided in *Plyler*, it was neither necessary nor essential to the resulting judgment. The *Plyler* court was not asked to hold the statute unconstitutional throughout the state. It could have granted all of the relief sought without even considering the issue of the facial constitutionality of the statute.

Finally, application of offensive collateral estoppel would be unfair to the State. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 n.14 (1979), the Supreme Court noted that "[a]llowing offensive collateral estoppel . . . may be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." The State previously had defended successfully the constitutionality of the statute in the state courts. *Hernandez v. Houston Independent School District*, 558 S.W.2d 121 (Tex.Civ.App.-Austin 1977, writ ref'd n.r.e.). That judgment is not binding on the plaintiffs

here; they are not the privies of the state court plaintiffs. It would be unfair to allow the plaintiffs, but not the State, to use offensive collateral estoppel in reliance on the one previous judgment in their favor. Accordingly, the plaintiffs' motion for partial summary judgment must be denied.

3. Motion to Proceed as a Class Action.

The plaintiffs seek to maintain this suit as a class action. Initially, the court was reluctant to grant the plaintiffs' motion.[11] These consolidated actions were filed in several districts. Questions about the effect of a particular school district's policy may not be typical of those questions pertaining to the other school districts. Further, the court did not want to postpone the hearing on the merits to take up the class question.

Having heard the evidence, the court concludes that this action should proceed as a class action with respect to the issue litigated in this consolidated proceeding. The transferor courts should consider separately whether the plaintiffs' claims against the various school districts for damages should be maintained as class claims.

It is clear that the class proposed is so numerous that joinder is impractical. Both the sheer numbers and the difficulty of locating class members prevent joinder. Whether section 21.031 is constitutional is a question of law which is common to the class and the claims of the representative parties are typical of the caims of the class. The representative parties, Elvia Mendoza, Miguel Mendoza, Javier Mendoza, and Jorge Mendoza, and their counsel, have represented the class adequately and fairly and the court believes they will continue to do so. Accordingly, the class representatives satisfy the requirements of Rule 23(a). In addition, the court finds that the State has acted on grounds generally applicable to the class and concludes that final injunctive relief is appropriate with respect to the class as a whole. Rule 23(b)(2).[12] The class is defined as all children who are over five and not over 21 years of age at the beginning of the scholastic year and have been or will be denied admission to the public

schools in the State of Texas on a tuition-free basis becau
the alienage provisions of section 21.031 of the Texas E
tion Code.

C. THE CHALLENGED STATUTE

Prior to September 1, 1975, the Texas Education C
provided that all children between six and 21 years o
were entitled to attend the public schools of the di
where they resided. Funds were provided to the schoo
tricts by the State in proportion to the school district's
age daily attendance. All children were counted in th
culation of average daily attendance provided they sa
the age and residency requirements.[14]

In April, 1975, the Attorney General of Texas, upon
quest made by the Commissioner of Education, issu
opinion holding that *all* children within the State wer
titled to attend public schools in the district of their resi
regardless of whether they were legally or illegally
the United States.[15] Prior to the Attorney General's Op
there had been no established policy regarding the adm
of undocumented children to the public schools. A small
ber of school districts excluded undocumented childr
that time.[16]

In May, 1975, the Texas Legislature amended the
Education Code. The amended statute, Tex. Educ. Code
tit. 2, § 21.031. provides in pertinent part:

> (a) All children who are citizens of the Unite
> States or legally admitted aliens and who are ove
> the age of five years and under the age of 21 year
> on the first day of September of any scholastic yea
> shall be entitled to the benefits of the Availabl
> School Fund for that year.
>
> (b) Every child in this state who is a citizen of th
> United States or a legally admitted alien and who
> over the age of five years and not over the age of 2
> years on the first day of September of the year
> which admission is sought shall be permitted to a
> tend the public free schools of the district in whic

> he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Accordingly, undocumented children are not entitled to tend public school and they may not be counted when culating the average daily attendance which determines school district's share of the Available School Fund. L school districts are given the discretion to deny admissio to permit attendance upon payment of tuition.

Needless to say, the effect of the new statute is to excl undocumented children from the Texas public schools.. though some school districts continue to educate all childr the majority exclude them or require tuition.[17] There wa evidence that any undocumented children are presently tending school upon payment of tuition.[18]

An evaluation of the statute properly may not proceed the assumption that the statute operates only to prohibit use of state funds to educate undocumented children. statute makes a distinction which treats undocumented c dren differently from all other children with respect to mission to the public schools. Section 21.031(b) & (c). As court has noted above, the effect of the amendment i exclude undocumented children from school. Even tho some school districts have opted to admit undocumented c dren, the State's financing scheme penalizes them for that cision; they receive less money per pupil from the State t school districts which exclude undocumented children. F ther, the statute was amended by the Legislature imm ately after the Attorney General informed the Commissio

of Education that undocumented children were attend public schools. It is reasonable to conclu amendment was a response to the Attorney Ge ion.[19] Several school districts which previously children now use the amendment as authorizatio undocumented children. Accordingly, it would to view this case as one involving only state fisc the method of financing the schools in Texas.

II. THE EQUAL PROTECTION CLA

Section one of the fourteenth amendment of States Constitution states in pertinent part: "N . . . deny to any person within its jurisdiction th tection of the laws." This provision, "unlike othe of the Constitution, confers no substantive rights no substantive liberties. The function of the equ clause, rather, is simply to measure the validity *tions* created by state laws." *San Antonio Ind. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., (footnote omitted). The equal protection clause legislative classifications are fair and that simil stanced persons are treated alike. States have tion in making classifications unless the classifica on a suspect criterion or unless the classification damental right or interest. *See Frontiero v. Ric* U.S. 677 (1973); *Shapiro v. Thompson*, 394 U.S *Harper v. Virginia Board of Elections*, 383 U.S *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Maryland*, 366 U.S. 420 (1961); *Chatham v.* F.2d 73 (5th Cir. 1980). *See generally* Gunther, Court, 1971 Term–Foreword: In Search of E trine on a Changing Court: A Model for a Newe tection, 86 Harv.L.Rev. 1 (1972). When no susp or fundamental interest or right is involved, the must nonetheless be reasonable, not arbitrary, a and fairly related to a valid government objectiv *lin v. Florida*, 379 U.S. 184, 191 (1964); *McGo land*, 366 U.S. 420, 425-26 (1961). If the classific

on suspect criteria or a fundamental right or i
fected, the statute can be upheld only if it is prec
to further a compelling governmental interest
Thompson, 394 U.S. 618 (1969). This rigid, no
two-tier approach requires the court to exam
and interest implicated and the nature of the
created in order to determine the appropriate le
scrutiny.[20]

A. THE INTEREST DIRECTLY AFFE EDUCATION

In 1954 Chief Justice Warren stated:

> Today, education is perhaps the most in
> function of state and local governments.
> sory school attendance laws and the great
> tures for education both demonstrate a rec
> of the importance of education to our democ
> ciety. It is required in the performance of
> basic public responsibilities, even service
> armed forces. It is the very foundation of
> izenship. Today it is a principal instrument
> ening the child to cultural values, in prepa
> for later professional training, and in helpin
> adjust normally to his environment. In the
> it is doubtful that any child may reasonabl
> pected to succeed in life if he is denied th
> tunity of an education. Such an opportunity
> the state has undertaken to provide it, is
> which must be made available to all on equa

Brown v. Board of Education, 347 U.S. 483, 4
other opinions the Supreme Court has re-empha
portance of education to members of modern so
endeavored to insure equal access to education
ities. *See, e.g., Ambach v. Norwick*, __U.S.__,
1589, 1594-95 (1979) (citing cases).

Nonetheless, the Supreme Court has stated t
tion, of course, is not among the rights afforded
tection under our Federal Constitution." *San*

School Dist. v. Rodriguez, 411 U.S. 1, 3
protection clause, however, does not s
those rights explicitly recognized in the
tution. "It is of course true that a law t
fundamental right explicitly or implicitly
stitution is presumptively unconstitutio
Thompson, 394 U.S. 618, 634, 638; id., a
opinion)." *Mobile v. Bolden*, __U.S.__,
1504 (1980).

In *Rodriguez* the Supreme Court cons
the method of financing public schools in
relied heavily on local property taxes. B
in taxable property values among the
tricts, substantial inter-district disparit
penditures resulted. The plaintiffs in *Ro*
the Texas system of financing public e
disadvantage children in poor school di
relative differences in spending levels
court stated that "no charge fairly cou
system fails to provide each child with
quire the basic minimal skills necessary
the rights of speech and of full particip
process." *Id.*, at 37. The challenged fin
cluded no one from the public schools.[21]
dren were denied admission because th
able to pay tuition.

The statute challenged in this acti
Many children received no education
the school districts in which they live
them admission, or because they cannot
quired. Those school districts which opt
ceive proportionately less state support
ercise their prerogative to exclude un
Under section 21.031, Texas has deci
children within their jurisdiction and
the benefits of education to others.

While holding that a system which c
for the education of some children tha

fringe upon a fundamental interest, Jus
the question whether absolute deprivat
portunity might require strict judicial
squarely presents the issue reserved by
in *Rodriguez*: what level of scrutiny sh
a statute absolutely deprives educatio
some children within the state's jurisdic

The Supreme Court noted in *Rodri*
court has the authority to sit as a "su
to create substantive constitutional ri
Mobile v. Bolden, __U.S.__, __, 100 S.
Lindsey v. Normet, 405 U.S. 56, 74 (
Williams, 397 U.S. 471, 485 (1970). No
gants present constitutional claims, the
or to determine whether their argume
the Constitution. The presumptive val
attaches to the actions of state legisla
shirk that responsibility. Our system of
courts to give their full attention to th
regardless of their novelty. With that sa
the question whether persons have a fu
access to education when the state has u
it to others.

Education is not among the rights aff
tion by the Constitution. The factors wh
mination of what rights and interests a
teed have not been identified clearly. I
Bd. of Elections, 383 U.S. 663 (1966), t

> Long ago in Yick Wo v. Hopkins, 1
> (1866), the Court referred to "the p
> of voting" as a fundamental politic
> preservative of all rights." Recentl
> Sims, 377 U.S. 533, 561-562 [1964
> doubtedly, the right of suffrage i
> matter in a free and democratic so
> since the right to exercise the fra
> and unimpaired manner is preserva
> sic civil and political rights, any

ment of the right of citizer
fully and meticulously scru

Id. at 667. According to this f
mental when it is preservative
other basic civil and political rig
the Constitution. *San Antonio*
guez, 411 U.S. 1 (1973), consi
sufficient connexity between e
speech or the right to vote. Alt
that education was a fundame
preme Court held that it was
Court reasoned that courts coul
ther the ability or the authority
the most *effective* speech or
choice." *Id.* at 36.

Initially, the issue in this cas
act affirmatively to maximize th
jurisdiction to exercise rights,
may choose to deny access to ed
persons within its jurisdiction.
to insure that the education p
all, or to require the state to ma
The plaintiffs seek only to parti
tem which has been established
This claim does not require a m
education that is constitutiona
imply that any resource which
guaranteed right must be pro
whether education is so closel
rights that a total deprivation
ly scrutinized. Before discussi
education and freedom of spe
whether the legal status of the
of the right to speak and to v
cludes that it does not.

First, there is little doubt t
good or for ill, are here to sta
that approximately ten perce
sons in this country will remai

Many of the permanent settler
United States and have come
await processing of their immi
ally, the current proposals on a
ship to many undocumented pe
See H.R. 9531, § 2a, 95th Con
qua, Legal Critique of Preside
documented Aliens, 23 Catholi
proposals may increase the n
from amnesty. Presently, many
in this country enjoy a form of *d*
boring legislation, in large part
Texan lobbyists, does its part t
portunities continue to attract
U.S.C. § 1324(a). The State of T
rejected efforts to discourage
mented workers. In 1979 and
duced which would authorize
who knowingly hired undocum
was reported out of the applica
received indicates that the Con
cient funds to stem the tide of in
nation has set immigration qu
garded. It thus is likely that ma
sons in this country will remain
government inaction.[23] While
they should not be denied the ri
C. Antieau, Modern Constitutio

The rights of man are not a fu
Nonetheless, it has been sugge
dowed with civil and political r
the United States was lawful.

> The Bill of Rights is a futil
> seeking admission for the fi
> But once an alien lawfully e
> country he becomes invest
> anteed to all people within
> include those protected b

Amendments and
Fourteenth Amer
knowledges any d
dent aliens. They
to all "persons" an
on those rights by

Bridges v. Wixon, 326
curring). This "entry
knowledges the congr
tion and the territoria
guarantee the enjoym

The authority to ac
the Constitution in th
admission of aliens of
Mow Sun Wong, 426
appropriate for judici
tailored to defer to c
regarding admission
status. Thus a person
States pursuant to 8
country for purposes
excluded without the
ther, Congress has th
jurisdiction for reaso
the context of domest
F.2d 1281, 1299 (5th
962 (1977), quoting,
(E.D.N.Y. 1975).

This useful doctrin
form a congressional
when judicial functio
nation of whether a p
be deprived of free
should not revolve ar
or exclusion. Whethe
try may exchange id
the proceedings use

here. Essentially, reg
migration status, the
doctrines.[25]

Courts may decide t
enjoyed by undocume
gressional control ove
stered by the nature
documented persons.
due process before th
Barber, 357 U.S. 185,
U.S 206, 212 (1953); *U*
(2nd Cir. 1958). This i
treats persons who h
have not physically er
into the United State
ous to apply the "entr
denying first amendn
country. Congressiona
ply state power to inf
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If a substantial conne
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sequential by the imm

Before considering
first amendment freed
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solute. As previously
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quired by some school
private schools, yet th
the plaintiffs could af
not absorb their numb
unable to accommoda
sion.[26] Other members
schools which have be
mented school age chi
schools do not provide
for those children wh

The alternati
facilities. In
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dence was pr
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exist in the f
tinuity is unc
few in numbe
mented child
the streets.[30]

Second, th
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Other testi
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to write.[35] Dr
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her opinion t

The court
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consequences

As this effect is magnified many times, it is possible to perceive the impact of the creation of a permanent underclass of persons who will live their lives in this country without being able to participate in our society. Additionally, the expert testimony focused primarily on the impact of exclusion from school in the abstract. When this impact is combined with the language barrier which exists, the extent of the problem becomes apparent. The public school has been a mechanism to assimilate immigrants into our society. Uneducated children who eventually will be admitted into this country, will never be admitted into the society.

In Texas the provision of education is a state function and that a person may look to private schools instead does not alter this fact. Section 1 of Article VII of the Texas Constitution states: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." References to public education were contained in the Constitution of the Republic of Texas enacted in 1836. The first State Constitution adopted in 1845 represented the diversity of opinion then prevailing regarding the state's duty to provide free public education to all children seeking it. The Constitution of 1869, however, settled the question and "required for the first time a uniform system of public free schools for the gratuitious instruction of all inhabitants between the ages of six and eighteen (art. IX, sec. 1) with compulsory attendance (art. IX, sec. 5) and a highly centralized system of school administration (art. IX, sec. 3)." Vernon's Ann. Tex. Const. art. VII, sec. 1 (1876) (interpretative commentary). In 1884, with the enactment of the school law, the idea of universal public education became completely accepted in Texas.

Current statutory provisions reflect the State's control of education. One need only cite the compulsory attendance law, Tex.Educ.Code Ann. title 2, Sec. 21.032 (Vernon's 1972), to illustrate the State's involvement in education. The State's ability to compel attendance reflects the social recognition of the governmental interest in educating all persons within the jurisdiction.

Other areas which may be occupied by state activity do not share with education the connection to the essence of government. If the state operates a utility or public transportation in a locale, those activities constitute a government invasion of or supplement to the private sector, not essential state functions.

The provision of education also is quite dissimilar from "the bounty that a conscientious sovereign makes available to its own citizens and some of its guests." *Matthews v. Diaz*, 426 U.S. 67, 80 (1976). Additionally, the State's educational system cannot properly be classified within "the area of economics and social welfare. . . ." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). When a state enters an area occupied by the private sector and endeavors to assist persons to obtain food, shelter, or medicine, there is no requirement that the state create classifications which are perfect. A state may undertake charitable functions without undue concern about making distinctions which are too fine or too imprecise. Such determinations are replete with "conflicting claims of morality and intelligence. . . raised by opponents and proponents of almost every measure. . . ." *Dandridge v. Williams*, *supra*, at 486. The legislatures are entrusted to resolve conflicts concerning the boundaries of state involvement in these areas.

Judicial deference, however, should be limited in areas which are occupied by state functions. Where the state traditionally has been the provider, discrimination with respect to access to a service should be disfavored when there is a close connection between the particular service and implicitly or explicitly protected constitutional right. In effect, this is another way of saying that with respect to a service which is provided as an essential function of government and not by the private sector, exclusion from access to that service will result in absolute deprivation. This should be scrutinized carefully.

One reason supporting the Supreme Court's decision in *Rodriguez* not to classify education as a fundamental interest was that "the logical limitations" of the plaintiffs' theory were "difficult to perceive." *Rodriguez*, *supra*, at 37. No such open

ended theory is involved in this case. When only *acc* education is deprived, holding that a fundamental inte involved does not occasion an unprecedented upheaval would terminate state control over education. An inte a governmental process or program may be deemed mental even though the government cannot be requi assure or even to determine what constitutes enjoym that process or program. An analysis of the extent right to vote is instructive.

The right to vote requires quantitative and not qual protection.[38] Thus, while "a citizen has a constitutionall *tected right* to participate in elections on an equal basi other citizens in the jurisdiction," *Dunn v. Blumstei* U.S. 330, 336 (1972), in states that have adopted the el process, the courts do not sit to insure "the most *inf* electoral choice." *San Antonio Ind. School Dist. v. guez*, 411 U.S. 1, 36 (1973). The plurality opinion in *Mo Bolden*, __U.S.__, 100 S.Ct. 1490 (1980), illustrates th ciple that the recognition of access to the ballot as a fund tal right does not imply a right of equality of result. Th occasion that makes the equality of result actionable is such inequality constitutes invidious discrimination b of the nature of the classification used or the group af The "right to participate in elections on an equal basi other qualified voters" does not herald a revamping of litical system. The "right to have an equally effective in the election of representatives is impaired where sentation is not apportioned substantially on the b population. Such an inquiry is objective and quantitat provides no license for the court to embark on subj qualitative analyses of the effect of elections on dist groups or to guarantee the right to representation. Th presence of a voting rights issue does not compel stric tiny. *Holt Civic Club v. City of Tuscaloosa*, 439 U (1978); *Town of Lockport v. Citizens for Community at the Local Level, Inc.*, 430 U.S. 259 (1977); *Sayle Co. v. Tulare Lake Basin Water Storage District*, 41 719 (1973); *Creel v. Freeman*, 531 F.2d 286 (5th Cir. *cert. denied*, 429 U.S. 1066 (1977); Note, 93 Harv. I 1491 (1980). *See also Clark v. Town of Greenburgh*, 4

770 (2nd Cir. 1971). Finally, classifying access to the ba a fundamental right does not require the states to m government offices elected ones. Once the state has g the franchise, however, restrictions on the right to vot strict scrutiny. *Harper v. Virginia Board of Electio* U.S. 663 (1966). Similarly, recognition of a right to ac education need not imply a right to equality of result undercutting the holding in *Rodriguez*. Where inequa educational opportunities results from racial animus discrimination will be struck down upon proof of racial criminatory intent or purpose. *Brown v. Board of E tion*, 347 U.S. 483 (1954). The right to attend school equal basis with other children living in the locale do require revamping the educational system. Any inquir the exclusion of children from public education can be tive and quantitative. Recognition of education as a mental right does not mean that the presence of educa issues in a lawsuit will require subjective, qualitative sis concerning the effect of education on all discrete gr

In summation, the court concludes that strict judicia tiny should be applied to determine whether the s violates the equal protection clause. The bases for thi clusion are the following: the statute absolutely de undocumented children of access to education thereby ing them great harm; there is a direct and substantia tionship between education and the explicitly guara right to exchange ideas and information; and, the provi education is not a social or economic policy but a state tion. Additionally, recognizing the right to access to tion when it is being provided to others does not imply to equal enjoyment of education.

B. THE CLASSIFICATIONS CREATED BY SECTION 21.031

1. Undocumented Aliens

Section 21.031 on its face creates a classification of u mented [39] children who are treated differently than all children within the jurisdiction. The court must dete not only what level of scrutiny should be applied to the

such a classification, but also whether any sc
While the plaintiffs claim that discrimination a
mented aliens is inherently suspect, the State c
permissible *per se*.

With respect to the plaintiffs' argument, t
cludes that states may treat citizens and r
differently than undocumented aliens, provided
ferences are reasonably related to a valid gov
jective and do not affect fundamental rights. I
rights are affected, state treatment of undocur
like state treatment of other persons within it
is justified only if it furthers a compelling
interest.

In *Graham v. Richardson*, 403 U.S 365, 372 (
preme Court stated that "classifications ba
age . . . are inherently suspect and subject to
scrutiny." The equal treatment of resident alie
two premises. First, the federal decision to a
aliens to permanent residence required "a gene
all persons in this country shall abide in any
equality' of legal privileges with all citizens u
criminatory laws." *Takahashi v. Fish & Game*
U.S. 410, 420 (1948). Second, in *Graham v. Ri*
pra, the court stated that "[a]liens as a class a
ample of a discrete and insular minority . . . f
heightened judicial solicitude is appropriate." *
ing United States v. Carolene Products Co.,
152-53 n.4 (1938). Undocumented aliens are
such disabilities, . . . subjected to such a histo
ful unequal treatment [and] relegated to such
political powerlessness . . ." that treating ther
crete and insular than resident aliens may
Nonetheless, undocumented aliens are not e
privileges conferred by admission to the countr
decision to admit resident aliens would be frust
restrictions on their activity. *Truax v. Raich*
(1915). The federal government has made no
concerning undocumented aliens.

Focus on the *Carolene Products*[41] rationale,
undocumented aliens are a class needing prote

majority and the political process. The politi
made insufficient efforts to exclude undocur
from the country and while they are here
quite willing to exploit them for their cheap
ally, the concerns of state governments norm
lated to the alienage or legal status of resid
Graham v. Richardson, 403 U.S. 365 (1971).
to classify based on a person's status as a cit
within "narrow limits." *Sugarman v. Dougal*
(1973). Accordingly, the normal deference giv
tion over matters which are the usual subject
lation is not justified when state classificatio
citizenship, or when no special attribute of cit
vant.[42] Nonetheless, the court concludes that
aliens are not a suspect class.

The guarantee of equal protection is a restr
eral government as well as the state governm
There is little question that the federal gover
undocumented aliens differently from citizens
iens. The Supreme Court explained in *Matthe*
U.S. 67 (1976), that the federal government c
imate distinctions between citizens and resi
cause of the governmental interest in regul
tion. The courts have not required the federal
show that the distinctions they make are prec
the exercise of the power to regulate immig
uralization.[44] Rather, federally drawn distin
aliens and citizens are upheld where there is
sis for presuming that the distinction was actu
serve an overriding national interest. *Hampt*
Wong, 426 U.S. 88, 103 (1976). Accordingl
of equal protection analysis, the federal po
immigration is sufficient to justify federal
against aliens. Further, the state's ability to
tinctions where their interests are apparent
the *Truax-Takahashi* rationale should contro
ham Court's reliance on *Carolene Products*,
considering whether strict judicial solicitude
tended to undocumented aliens.[45]

This does not imply that classificati
mented aliens are permissible by thei
the equal protection clause is inapplicat
umented persons. Analogous decisio
Court, the language of the fourteenth a
ings of other federal courts require tha
based on immigration status be subject

Although the Supreme Court has nev
ly the applicability of the equal protect
mented aliens, decisions construing th
ment do not suggest that the guarantee
reserved to citizens or resident aliens.
both the due process and equal protec
resident documented aliens. *In re G*
(1973); *Sugarman v. Dougall*, 413 U.S.
v. Richardson, 403 U.S. 265 (1971); *T*
Game Comm'n., 334 U.S. 410 (1948); *V*
States, 163 U.S. 228 (1891); *Yick Wo v*
356 (1886). The Supreme Court stated in
equal protection clause applied "to all pe
ritorial jurisdiction" of the United State
Yick Wo v. Hopkins, *supra*, the Supren

> The Fourteenth Amendment to the
> not confined to the protection of c
> "Nor shall any state deprive any p
> erty, or property without due pro
> deny to any person within its juris
> protection of the laws." These pro
> versal in their application, to all pe
> territorial jurisdiction, without re
> ferences of race, of color, or of nat
> equal protection of the laws is a pl
> tection of equal laws."

118 U.S. at 369. Inasmuch as undocum
tected by the due process clause, *Matth*
67, 77 (1976), the court can conceive of
that they are unprotected by the equal

The language of the amendment itsel
the proposition that undocumented alie

within the state may not invoke the eq
Undocumented aliens, like other hun
sons." The question, then, is whether a
is a "person within the jurisdiction" o
concludes that the qualification "with
the state should be given its commo
Accordingly, undocumented children w
are subject to its laws are "within the
Both the legislative history and the cas
ification confirm this conclusion.

There is no indication that the fra
amendment intended to limit which in
in the United States were "persons" fo
equal protection purposes. In fact, one
amendment said:

> The last two clauses of the first sec
> ment disables a State from depri
> citizen but any person, whoever
> liberty, or property without due
> from denying to him the equal pro
> of the state. . . .
>
> . . . [I]t will, if adopted by th
> disable every one of them from pa
> ing upon those fundamental rig
> which pertain to citizens of the U
> to all persons who may happen
> jurisdiction.

71 Cong. Globe 2766 (May 23, 1866).
tive history which groups the two cla
to interpret "any person" under the
ferent from "any person within its j
equal protection clause.

This does not mean that the langu
represents an inherent limitation on g
Blake v. McClung, 172 U.S. 239 (189
held that a Virginia corporation was
jurisdiction of Tennessee. The Court
protection clause

> manifestly related only t
> equal protection to persons
> Observe that the prohibit
> tion of property without d
> qualified by the words "
> while those words are f
> clause relating to the equa
> The Court cannot assume t
> serted without any object
> eliminate them from the C
> pret the clause in question
> found in that instrument.
> state what is the full impo
> its jurisdiction," it is safe t
> not created by Tennessee,
> under conditions that subje
> from the courts of Tenness
> ors, is not, under the ab
> teenth Amendment, withi
> state.

Id. at 260-61. To recognize the
register approval for discrimi
Rather it is a recognition that

> Manifestly, the obligation
> protection of equal laws
> where its laws operate, tha
> diction. It is there that th
> must be maintained. That
> the Constitution upon the
> ernmental entities,—each
> laws establishing the righ
> within its borders.

Missouri ex. rel. Gaines v. Can

The reason for limiting the r
vious: it necessarily is limited
diction.

> A most extraordinary co
> legislation of the states pr

appropriate sphere were
it does not extend to ar
their jurisdiction. A leg
created. Neither the n
move forward; the forme
ters purely of state conc
Constitution, and the la
effect none if they cann
and without their jurisd

Dolley v. Abilene Nat. Ban
1910), *aff'd*, 228 U.S. 1 (19
within the state stand in suc
them "within its jurisdictio
clause "does not prohibit legis
the objects to which it is dir
which it is to operate. It m
subjected to such legislation
circumstances and conditions
and the liabilities imposed." *
ings Bank, 170 U.S. 283, 293
U.S. 68, 71-72 (1887). *See al*
York, 134 U.S. 594 (1890). T
are persons subjected to the
this action. They are physical
Texas. *Shames v. State of Ne*
1338 (D. Neb. 1971).[47] Other
that the equal protection
aliens. In *Bolanos v. Kiley*,
1975), Judge Friendly stated
due process and equal prote
Amendment apply to aliens
and even to aliens whose pr
Holly v. Levine, 529 F.2d 12
U.S. 954 (1976); *United Stat*
n.3 (2nd Cir. 1975); *Doe v.*
(E.D.Tex. 1978). *See also He*
Dist., 558 S.W.2d 121 (Tex.
ref'd n.r.e.).

Accordingly, the eq
mented aliens because
tion" of the state. Sta
is not necessarily perm
is infringed by that di
compelling justificatio

**2. Exclusion of Undo
Wealth**

Within the plaintiff
unable to attend scho
tion. Section 21.031
State has authorized t
upon the payment o
against children on th
children who cannot a
tonio Ind. School Di
(1973), the Supreme C

> If elementary an
> available by the
> tuition assessed a
> a clearly defined
> in terms of thei
> sum—who would
> ceiving an educati
> more compelling s
> sistance than the

That set of circumstan

Several of the name
prevented from atten
could not afford tuitio
any children being ad
tricts which condition
This is not surprising
parents of undocumen
digent. A study of th
undocumented childre
mean hourly wage w

1978 found that the
persons was $2.75.
stated that: "The si
mented person . . .
States."[54]

It is worth noting
contribute to gover
others with similar
which discuss the co
cal, state and feder
group pays more in
through social servi
istence and the fea
aliens are one of the
vices. The public sc
marily through sale
Undocumented alie
those taxes; they b
contribute property
rent.[55]

The Supreme Cou
the basis of wealth
two conditions are
class of disadvantag
access to a state ben
or service must not
cial welfare." *United*
Both of these condit
of undocumented ch
ment is definable in
scribed sum. . . ." *
This is not a questio
advantages. The ar
resources occasione
benefit.

It has already bee
ered a social or ec
perhaps the most i
government." *Brow*

493 (1954). Ex
Court has hel
stitutional rev
serving of pro
in those cases
not compel sp
from educatio

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required to insure absolute equality which exists only hypothetically. On the other hand, absent sufficient justification, states may not permit some persons to benefit from certain state services and to be free from certain burdens because while others are barred completely because they cannot pay.

The form of "wealth discrimination" upheld in *Rodriguez* is not encountered in this case. Accordingly, the court concludes that a state law which operates to deprive absolutely children of education when they are indigent should be scrutinized with care.

3. Innocent Children

Section 21.031 penalizes children because of acts committed by their parents.[58] In *Doe v. Plyler*, 459 F.Supp. 569 (E.D.Tex. 1978), Judge Justice stated:

> A more exacting scrutiny of the Texas law also appears warranted when consideration is given to the decisions of the Supreme Court refusing to penalize and stigmatize children who are not in a position to prevent the wrongful acts of their parents. As Mr. Justice Powell said of laws disfavoring illegitimate children:
>
> > [V]isiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.
>
> *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 175, 92 S.Ct. 1400, ,1406, 31 L.Ed.2d 768 (1972) (footnote omitted). *See also St. Anne v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974) (invalidating school board's decision to suspend two children from the school because their mother had assaulted an assistant principal, on the ground that "[f]reedom from punishment in the absence of *personal*

> guilt is a fundamental concept in the American scheme of justice." While the undocumented minor plaintiffs are of course legally culpable and subject to deportation, they can hardly be held morally responsible for their presence here. Many of them were hardly more than infants when they arrived in the United States, nor did they participate in their parents' decision to emigrate; consequently they deserve no additional burdens or penalties.

Id. at 582. The court finds that this analysis is supported by the evidence received in this proceeding.

Undocumented children do not enter the United States unaccompanied by their parents. Like other young children, they seldom have the power to choose their place of residence. For example, the court heard testimony from a young girl who entered the United States when she was five months old. Although the girl's father is a United States citizen and the child's mother is a documented resident alien, the child has no documents. She is, of course, documentable. Nonetheless, due to her difficulty receiving her Mexican birth certificate, she remained undocumented and was excluded from school. The young girl previously had attended school in New Jersey and Missouri. Her eight year old brother was born in the United States and attends school.[59] There also was testimony from another undocumented child who has siblings who were born in the United States and thus are citizens.[60] Any argument that the family should be treated as a unit when moral culpability is assessed is undercut by these facts. Those who were born a few years prior to the unlawful entry are no more responsible for it than those born shortly afterwards.

Cases involving classifications which punish children for acts committed by their parents are not subject to strict judicial scrutiny. They nevertheless are invalid if they are not substantially related to permissible state interests. *Lalli v. Lalli*, 439 U.S. 259, 264 (1979). This formulation of the rational basis test will not accept any conceivable justification for a statute. The legislative means as well as the ends are subject to examination.

4. National Origin

It is suggested that section 21.031 is part of an historica
tern of discrimination against Hispanics in Texas. It is argue
Mexican-Americans residing in Texas will perceive excludi
documented aliens from school as more discrimination a
Hispanic people. Suffice it to say, the court concludes that
has been invidious discrimination in Texas against persons
count of their national origin. There has also been discrimi
against persons on account of their illegal presence i
country. The statute, however, creates a classificaiton
loosely on immigration status, not national origin. State legi
discriminating against a class of undocumented persons i
missible if it is sufficiently justified. The amount of justificai
quired should not vary depending on the citizenship of a
documented person. It also should not be dependent
history within a particular state regarding discrimination a
citizens of a particular national origin. Thus, a state which
has discriminated against Mexican-Americans bears no
burden of justificaiton for discrimination against Mexica
documented persons. Conversely, the court concludes th
State of Texas could not pass legislation which would be inv
to Mexican citizens, but valid as to other aliens. The court
condemn section 21.031 on the basis of ***Yick Wo v. Hop***
118 U.S. 356 (1886). Although the State generally monitor
pliance with the section by examining the immigration st
citizenship of Spanish-surnamed persons, there is no ev
that non-Hispanic aliens are intentionally treated differentl

C. STATE RATIONALE FOR SECTION 21.03

In defense of its decision to exclude undocumente
dren from the public schools, the State presented ev
concerning (1) the number of undocumented children i
as; (2) the financial impact of educating these child
state and local resources; and (3) the impact of educati
documented children on the quality of education and o
pliance with desegregation orders. The State conten
the equal protection clause does not apply to undocur

aliens and thus that discrimination against members c
class is permissible no matter how invidious. Noneth
the State offered evidence which it believes demons
that section 21.031 is supported by a rational basis.

At the outset, the evidence demonstrated that prior
passage of the amendment to section 21.031 in 197
State never had attempted to determine the number
documented children attending Texas public schools, n
impact of educating these children upon the school dis
The current Commissioner of the Texas Education A
was the Deputy Commissioner at the time section 21.03
enacted and he was then primarily responsible for its i
mentation. He testified that no one from the Texas Le
ture contacted anyone at the Texas Education Agency
to the amendment. No studies were conducted to dete
the number of undocumented children throughout the
or the fiscal impact of educating them. No one attempt
compare the amount of taxes paid by undocumented
with the cost of educating undocumented children.[61]

Since the law was amended, the State has done very
to monitor the implementation of the statute by the
school districts. There is no evidence that the State has
determined the number of local school districts which a
cluding undocumented children, the number of schoo
tricts that charge tuition, or the number of school dis
that provide tuition-free education to all children within
jurisdiction. Because this basic information has not
gathered, no effort has been made to determine the nu
of children actually affected by section 21.031. There is
**ta which show that the academic performan
students has improved since undocumented chi
were excluded.**[62]

Indeed, the evidence in this case indicates that the
has been concerned primarily with the impact and num
documented Mexican children. With the exception of a
commissioned in connection with this case, the State
sored studies have concentrated on the characteristi
number of documented immigrant children. The studie
shown a steadily increasing number of immigrant chi
primarily in the border areas. In addition, the studie

cate that most of the children require bilingual e
that the influx of these children has created a p
border districts that have limited space to ho
dents.[63] Funds provided to the local school dis
**State may not be used for construction[64] a
with relatively small amounts of taxable p
growing student populations have difficul
new structures. This problem however, is n
school districts with decreasing student
and adequate taxable property.**

The current conditions afflicting some bord
tricts result in part from the influx of docum
These new residents offset the decline in schoo
tion which is being experienced elsewhere in th
der school districts are not in danger of being a
documented children who reside in Mexico atter
lic schools in Texas. In 1977, the Texas Legislat
section 21.031 by adding subsection (d) which re
not living with a parent or guardian to estab
presence in the school district is not for the pri
of attending the public free schools." This prov
signed in part to prohibit children whose par
Mexico from being able to establish residence
States by living with another family.[65]

1. The Number of Undocumented Children ir

The State's assumption concerning the poten
undocumented children on the public schools i
estimate of the number of undocumented child
residing in Texas. It must be emphasized that
rent figure is of concern; no evidence was offe
plied that the number of undocumented chil
Texas and attending the schools in 1975 had
public education. Thus, the State does not a
number was so great in 1975 that it was necess
undocumented children, but that once they
cluded there are too many to incorporate them

In preparation for the trial of this case the St
to calculate the number of undocumented child
the State. Experts in the area are in general a

there is no indisputable or acceptable estimat
mented alien population in the United States
number of undocumented alien children.[67] Thi
ing given the difficult methodological proble
attempting to enumerate a clandestine popu
this context that the State's estimate must b

The State's study was conducted by Mark
ployee of the Dallas firm, Criterion Analysis.
Criterion Study)[68] attempted to estimate the
ber of undocumented children residing in T
step was to calculate the "documented Hisp
population." Assuming that only documente
in the school system, Criterion obtained th
"figure" by totalling the Hispanic students in
private schools, and those reported as "sch
the second step, Criterion subtracted the "do
panic school age population from the census fi
panics in Texas aged five to seventeen. The re
was called the "potential undocumented Hisp
population."

Criteron attempted to verify the assumpt
sidual represented undocumented children b
same methodology to the total school age p
races. Because the residual for all races was n
larger than the residual for Hispanics, Crit
that the methodology in fact calculated
children.[69]

The major shortcoming of this analysis is t
an estimate of the number of children not en
rather than of undocumented children. To as
dren not enrolled in school are undocumente
sound.[70] Two aspects of this study demonstr
this assumption. First, under the methodol
Criterion study, the residual "potential undo
panic population in 1970 is found to be 80
school districts admitted undocumented ch
1975, there is no basis for concluding that t
enrolled in school in 1970 were undocumer
Hispanic children purportedly out of school a

to be documented as undocumented. M
inexplicably does not demonstrate any
Hispanic children not enrolled in school
of the exclusionary statute.[72] Thus, t
strates no correlation with what one wou
be the pattern caused by the implementa
in 1975.

Second, the study uses two different
in an inflated estimate of the number
school. The 1970 census estimate of tota
public schools for all races is comparabl
However, when broken down ethnical
shows more Hispanics enrolled and few
than does the TEA data.[73] This discrep
Hispanics between the census and the T
due to the use of a more limited Hispani

Inasmuch as the study subtracted th
lower estimate of Hispanics, from the
higher estimate, to determine the numb
children, the figure was necessarily hig

The unsoundness and unreliability of
ogy is further demonstrated when one
sumption of the study to the blacks a
Analysis of either census enrollment
TEA data, results in the rather bizarr
clusion that there are at least 100,000
and white children in Texas.[76]

Even if one accepts the flawed assur
the study, four additional problems res
timate of the number of undocumente
First, Criterion's analysis of school leav
dren under 17 who dropped out wou
of state compulsory attendance laws.
school leavers, however, defines a sch
who "left school prior to graduation and
trict's knowledge will not enroll in an
Criterion's analysis, documented sch
leave school and do not return are co
"potential undocumented" children.[77]

Second, the study neglected to tak
mented five and six year olds who h
school. A breakdown by age and cens
of the children not enrolled in schoo
are five or six years old. This error w
the number of "potential undocumer
at least one half. The study used two
which did not measure children in t
The census data covered only ages f
TEA enrollment data includes childr
age groups.[78]

Third, the study ignored the censu
children. When census and TEA d
making necessary adjustments for cr
two independent data sources, unreli
An expert in census data on Hispani
terion study was "not . . . done by a
derstands the census data."[79] When
TEA data, census enrollment data de
sus had higher enrollment estimates
and lower estimates than TEA for wh
lidity of the study is founded on the
tions for blacks and whites. This is a
found in the two data bases, and w
compensate for the cross biases the
See supra footnote 76.

Finally, while attempting to estir
mented children," the Criterion study
the children not in school. Reliance
ment data suggests that it may not
of that statistic. One State witness t
ticular year the enrollment data for
dent School District were in error by
percent.[81] If this is typical, the Cri
meaningless . . . [because] the error
to arrive at the measurement would
surement itself."[82] The court finds t
does not represent an accurate estim
documented children in Texas.

The study by no means sug
by the demographers who hav
for years should be rejected. I
ered the foremost authority on
documented Mexican nationals
that he calculated the numb
school age children in Texas to
estimate is much more in lin
which have been done by othe
entists attempting to assess th
of undocumented Mexican na
States.[83]

The final element to the que
argument that providing edu
dren would serve as an induce
persons to cross the border.
suggests that one of the base
slow the flow of illegal immig
statute is impermissible. Mea
decrease immigration, whethe
ince of the federal government
351 364 (1976), the Supreme C
to regulate immigration is unc
eral power." Insofar as the Sta
ducements to immigration, the
permissible state interest.

In addition, the evidence de
ed persons do not immigrate in
tion. Virtually all of the undo
into this country seek employ
ucational benefits. The State
ability of jobs is the major fact
aliens into the United States.
dence of the primacy of emplo
for immigrants,[85] and of the un
as a stimulus for immigration."
that other social services in thi
or sought by undocumented
those services has not been sh

of illegal immigration. Undoc
Texas with a vision of Amer
they come here to work. Fin
excluding undocumented per
There is no evidence that othe
number of undocumented pe
those states because of the a
tion. The court finds that free
significant attraction for undo

Fiscal Impact

The State contends that s
rational basis because it sa
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thinly. This, it is argued, wou
ity of education in the State,
for other social services. One
tion Agency used this analog

> If our total population ca
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> liner has gone down, an
> boat and the life boat hol
> ready have fifty people o
> what similar to the situa
> we have the capacity for
> a need for a greater capa
> pacity, but we still have
> still people out there in t
>
> Now if I make the d
> that life boat, that I wil
> dred people and sink tha
> saved, would I be justif
> low some of those peopl
> drown so that I can sav
> have in the boat?
>
> . . . . We can stretch
> get to the point when th

> equately meet th
> the teachers are
> ing to quit teach
> sort of situation
> down.
>
> . . . . You have
> save. You have t
> number of childr
> or nearly adequat
> some way determ
> insignificant (sic)
> services would t
> that none of th
> served.[89]

Without suggesting
ever justified, the cou
case. Permitting undo
schools clearly would
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school districts lack t
for the State noted in

> There is no plac
> State has said
> enough money.
> with the money.
> fund certain proj
> to fund it. The St
> in its budget.[90]

Without a reliable
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excluding children fr
Nonetheless, the evid
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Initially, Texas en
of economic growth

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expense of educatin

The witnesses agr
derived from consum
Revenues raised by
Monies for education
nue Fund, the Omni
Motor Fuel and Ta
Fund.[93] Each one of
plus) as of August 31
General Revenue Fu
years, and for at lea
$600 million.[94] The
that the General Re
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jected surplus is su
tion of all undocume
correctly estimated
age children. The I
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average daily attend
the State would be
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and the current stat
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has grossly overesti
dren in Texas.

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3. Bilingual

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than a hyp

affect desegregation. The State did not even attempt to show that compliance with desegregation orders would be made more difficult. The State's bald assertion is insufficient to provide even a conceivable basis for the statute.

D. APPLICATION OF JUDICIAL SCRUTINY

Maintaining the fiscal integrity of the public schools is an important and legitimate state interest. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).[101] States have the responsibility of safeguarding all monies entrusted to them by the taxpayers and these demands are increased when a fundamental state function such as education is involved. That does not mean that any measure which saves money is constitutional. The court has concluded that the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit. When strict judicial scrutiny is appropriate, important or legitimate governmental interests are not sufficient to justify legislative classifications. The classifications, if they are to be upheld, must be shown to be necessary to promote a compelling governmental interest. *In Re Griffiths* 413 U.S. 717, 721-22 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Graham v. Richardson*, 403 U.S. 365, 375-76 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Carrington v. Rash*, 390 U.S. 89 (1965). Additionally, the factor which is the basis for differentiating between persons otherwise equal may not be capricious or irrelevant; it must be germane to the effectuation of the State's interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535-38 (1973); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 243 (1971) (Brennan, J., dissenting); *Turner v. Fouche*, 394 U.S. 346, 362 (1970); *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). Finally, the State is required to show that there are no less restrictive alternatives available. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The State has not carried this heavy burden of justification.

First, the concern for fiscal integrity is not a compelling[102] state interest. *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

Second, the State has not shown that excluding children from school is in any way necessary to the improvement of the education in the state. As the State argued in *Rodriguez*, there is no evidence that the quality of education is somehow strictly tied to the amount of money expended on each child. 411 U.S. at 24 n.56, 42-43 & n.86, 46 n.101. The State now wishes the court to assume without any credible supporting evidence that a proportionately small diminution of the funds spent on each child will have grave impact on the quality of education. Naturally, the court shares the State's concern for the quality of education. This memorandum should be ample evidence that this court believes that education is a critical state function. Barring the doors to a distinct group of children, however, is the most, not the least, drastic alternative available.

Third, the State has not shown that the classification used actually advances the state interest. The classification employed by the statute is, loosely speaking,[103] a function of federal immigration status. The undocumented children are otherwise similarly situated to the other children in the State. Nothing about their immigration status by itself distinguishes them from other children in terms of their educational needs.[104] The parents of undocumented children, along with other parents, finance public education. The classification used is wholly irrelevant to the achievement of the State's objective. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). The exclusion of undocumented children no more relates to the saving of educational resources than does denying access to education to a similar number of documented and citizen children. The State never attempted to examine the impact of undocumented children on the schools before deciding to exclude them. It is thus not surprising that the classification used is in no way carefully tailored or drawn to advance the state interest.[105]

Equal protection of the laws is meaningless unless it applies to the unpopular as well as the popular, the weak as well as the strong. As the Supreme Court has stated:

> Equal protection of the laws is something mor
> than an abstract right. It is a command which th
> state must respect, the benefits of which every pe
> son may demand. Not the least merit of our const
> tutional system is that its safeguards extend to all-
> the least deserving as well as the most virtuous.

Hill v. Texas, 316 U.S. 400, 406 (1942). The undocum
children residing in the State of Texas are entitled t
protection. Section 21.031 of the Texas Education Cod
not employ a classification which is necessary or substa
related to a compelling governmental interest.[106] A
ingly, that statute violates the equal protection clause
fourteenth amendment of the United States Constituti

III. PRE-EMPTION

State legislation which improperly encroaches
an area of federal responsibility or concern will be
invalid under the pre-emption doctrine. The
emption doctrine has two elements: state legislat
pre-empted if it regulates matters which are subje
exclusive federal legislative control[107] or if it con
with the effectuation of congress
objectives. Under the first formulation, congress
power should be deemed to "oust" state authority
"the nature of the subject matter permits no othe
clusion" or when Congress has unmistakably so or
ed." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976), *qu*
Florida Lime & Avocado Growers v. Paul, 373 U.S
142 (1963). In the second circumstance, whe
federal legislation contemplated complimentary
legislation, state law will be held invalid if it "stan
an obstacle to the accomplishment and execution
full purposes and objectives of Congress." *Hi*
Davidowitz, 312 U.S. 52, 67 (1951).

The issue before the court is whether Title I o
Elementary and Secondary Education Act of 1965
I) pre-empts section 21.031 of the Texas Educ
Code. Title I does not reflect a congressional inten
occupy or to oust the states from the field of educ
and the nature of the subject matter certainly pe

the contrary conclusion. Accordingly, the iss whether section 21.031 burdens or conflicts with fe objectives. In order to determine whether su burden or conflict exists, it is necessary to examir objectives and statutory schemes of both legisl provisions.

There is no legislative history accompanying the amendment to section 21.031, yet it is possible to asc governmental objective to the statute. The purpose o tion 21.031 has been described as the protection of the integrity of state and local educational programs. The od used to save money is to reduce the number of stu and in particular the number needing bilingual educatio though legislative history of a subsequent amendment t tion 21.031 suggests that the Texas Legislature may had other motives, *see* n.84 *supra*, the court will assum the Legislature had no illicit purposes and that the st was not intended to regulate a matter subject to exc federal power. Education is a matter of state and loca cern under the police powers.

Title I, 20 U.S.C. § 2701 *et seq.*, is the major progr federal aid for elementary and secondary schools. E stated, Title I provides funds to state and local educa agencies for the development and implementation of cor satory programs designed to supplement the educatio vided to those children targeted by Congress as "educ ally deprived." The declaration of policy found in Title U.S.C. § 2701, states:

> In recognition of the special educational needs children of low-income families and the impact tha concentrations of low-income families have on th ability of local educational agencies to support ad quate educational programs, the Congress hereb declares it to be the policy of the United States t provide financial assistance (as set forth in the fo lowing parts of this subchapter) to local education agencies serving areas with concentrations of the educational programs by various means (includir pre-school programs) which contribute particular

> to meeting the special educational needs
> tionally deprived children. Further, in r
> of the special educational needs of childı
> tain migrant parents, of Indian childr
> handicapped, neglected, and delinquent
> the Congress hereby declares it to be th
> the United States to provide financial ass
> set forth in the following parts of this s
> to help meet the special educational nee
> children.

The Title I Migrant Program, 20 U.S.C. §§
resents a congressional commitment to the e
a federal program designed to provide an el
nuity to the education of children whose par
tory agricultural workers.

> These children have often been called the
> cationally deprived children in America.
> tional Advisory Council on the Educatio
> vantaged Children has stated: "the migr
> constantly moving; he has no continuity
> cation or his life in general; he is in the ta
> of non-English speaking children in the
> gram. He is out of the mainstream of an
> ciety and has few bases for security. H
> are in the fields all day, and in the forma
> and later, he is either there, working wit
> at home babysitting with the younger ch

3 *U.S. Code Cong. & Ad. News* 4113 (1974).

The annual federal appropriation for Title
$3 billion.[109] Ninety percent of the school distri
try participate in the program; approximately
dren currently are being served. 5 *U.S. Cod*
News 4973 (1978). Of the various kinds of
privation recognized under Title I, it is th
child and the migrant child who rank first and
tively in terms of the amount of money appro
category. Participation in the program is ent

both on the part of the states and on the par
districts within the state. Since its enactm
there has been consistent participation by nir
all school districts in the state.[110] Nothing in
regulations distinguishes between documente
mented children.

The amount of money a state will receive u
for Title I funds is computed through the use
formula." 20 U.S.C. § 2711. Briefly, a state's a
termined by multiplying a percentage of the s
expenditure by the number of children residi
aged five through 17 from families below the p
counted in the 1970 census. According to th
there are more "formula" or impoverished ch
in Texas than in any other state. Based upon
in the state, Texas has received $1.3 million in
revenue since the law was enacted.[111] Over c
amount, almost $600 million, has been allocat
since fiscal year 1976 and the enactment of se
Undocumented children play an important ro
tual allocation of Title I money to Texas. The
sus made every effort to count every indi
within our national boundaries in the 1970 cer
parent that substantial numbers of the "formu
in fact undocumented children.

In contrast to the general Title I program
census statistics to determine the residency
dren for the purposes of federal funding, the
Program involves an ongoing effort to identif
migrant child residing in the United States. C
migrant child is identified, he is given an ider
ber and is then enrolled in the migrant stude
tem (MSRTS), and a computer record is main
migrant child in the United States.[114] In accor
federal funding formula, the number of migra
rolled in the MSRTS and found to be residing
ing a given year determines the amount of
Funds to be awarded to that state in the su
year.[115]

Texas, like other states participati
Program, is under a federal obligatio
ble migrant child residing in the stat
the MSRTS. 45 C.F.R. §§ 116d.10(
39(f). These children do not have to
be identified and enrolled in the MSR
the federal definition of current or f
regulations pertaining to the identif
dren are interpreted as a blanket pr
ing into the immigration status of eitl
45 C.F.R. § 116d.12. There is no que
undocumented children into the MSI

As a result of the ironic relationshi
utes, Texas receives money for edu
government because of the presence
cluded from school. The children are
federal funds supplementing their
they receive no education at all. Des
State, the court concludes that Title
tion 21.031.

Whether a state statute stands a
complishment and execution of the
tives of Congress requires two sep
first be determined whether there is
the express provisions of the very te
California v. Zook, 336 U.S. 725, 72
ington, 302 U.S. 1, 4 (1937). *See als*
U.S. 351, 363-65 (1976); *New York*
Servs. v. Dublino, 413 U.S. 405, 422
cific conflict between the state and
pliance with both the state and feder
cal impossibility. *Florida Avocado G*
132, 142-43 (1963). The State's actio
any specific provision of Title I, ar
face, is not inconsistent with the fed

Second, the court must "consider
state and federal laws as they are
not merely as they are written." *Jo*
430 U.S. 519, 526 (1977). The salient

it is designed to provide supplementar
tional agencies. This major purpose is
accomplished unless all formula childr
financing scheme employed by Title I
all formula children must benefit from
First, the census was used to compute
children despite criticism; it was simp
able. It continues to be used (along wit
mulas) even though there have been
the intervening decade. The childre
years old in 1970 were thirteen to twe
the use of the census was reaffirmed
counted in 1970 in the north had move
this was recognized, Congress contin
Second, a child may be "formula eligib
the statute not benefit from supplen
educational agency may "skip" certai
number of formula children to provi
schools with a greater number and
low-income students. Looking at th
a whole, Title I does not pre-empt
prevents formula children from bene
funds. For example, Title I does not p
tion program which omits kinderga
olds are formula children. The court c
the formula does not designate the chi
fit from federal assistance, but rather
tain significant numbers of educationa

Finally, the voluntary nature of T
finding that section 21.031 is pre-em
the state has received over $600 milli
the state statute was amended. The C
tion (now the Secretary of Educatio
that Title I pre-empts state programs
consistent with the federal objective
reached a similar conclusion in *New*
cial Servs. v. Dublino, 413 U.S. 405 (

Moreover, the Depart
and Welfare, the agenc
for administering the F
including reviewing
never considered the
emptive. HEW has foll
of approving state pla
requirements so long a
arbitrary or unreason
knew of this settled
time of enactment of W
had welfare work progr
passage, HEW has con
requirements. Pursuan
has received federal gr
of its FTC plan, includi
terpreting this statute
"the construction of a s
its execution should b
compelling indications
Lion Broadcasting Co.
(1969); *Dandridge v. W*
In this case, such indic

Id. at 420-21. The quoted l
the question of congressio
less, it also suggests that
vides for voluntary particip
of state plans should not be
state laws that both cannot
tion could withhold payme
withhold or reduce payment
tricts. 20 U.S.C. § 2836(a).
eration of both statutory s
one another without holdin
Cf. Silver v. New York Sto
(1963). In this instance, wh
exists, any conflict betwee
should be resolved by coo

and not judicial decree. *See D*
court concludes that Title I of
Education Act does not pre-e
Education Code.[118]

IV. INTERNATIONAL LA

A. Section 21.031 and United

The United States is a m
American States, having rat
ter on June 19, 1951. 2 U.S.T
tered into force December
amended by the 1967 Protoc
ratified by the United States
6847, O.A.S.T.S. No. 1-A, O.A
2 (entered into force Februar
sions of the amended Charte
with education. Article 31 pro

> To accelerate their eco
> ment, in accordance wit
> procedures and within th
> cratic principles in the
> American system, the me
> cate every effort to ac
> goals:
>
> . . . .
>
> h) Rapid eradication of i
> educational opportunitie

Article 47 provides:

> The Member States will
> in accordance with their
> insure the effective exer
> tion, on the following ba
>
> a) Elementary educ
> dren of school age, shall
> who can benefit from i
> State it shall be without

b) Middle-l
progressively to
ble, with a view
diversified in su
ment needs of
providing a gen
c) Higher
provided that, i
the correspondi
dards are met.

The plaintiffs assert
is a self-executing tr
21.031 under the su
cl.2.

A treaty is an inte
ture between two
made under the aut
preme law of the lan
ternal law of the Uni
law only when that
legislation or is, by
Robertson, 124 U.S.
U.S. (2 Pet.) 253, 3
F.2d 862, 875 (5th Ci
242 P.2d 617 (1952);
tions Law of the Uni
statement). Accordi
made by the United
tic law in the United
the United States a
§ 141, comment a
domestic law of the
binding on the Unit
non self-executing,
Congress.

Whether a treaty
tation to be determi
tal, 589 F.2d 862, 8

555 F.2d 848, 851 (D.C.
ements to the questio
First, the language of t
ties intend to confer ri
the compacting nation
States Dep't of Interior,
J., concurring). Secon
course may be had to
ecution. . . ." *Sei Fuji*
P.2d 617, 620 (1952). A
cludes that Article 47
ganization of America
executing; it was "not
government." *Diggs v.*
Cir. 1976).

Article 47(a) is no
intention to create a
rights. The article rea
struction. Article 47
Member States will ex
with their constitution
ercise of the right to e
promissory language
implementing legislati
form a particular act,
advance the cause of e
provide free public e
within the country. Th
amended Charter of t
non self-executing tre
consistent state laws.[1]

B. Section 21.031 a

The Constitution e
the President and t
trudes into or interfe
cannot stand. The pl
be invalidated under t

VI, cl. 2, bec
eign policy. '
and the expa
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rights.[120]

The twent
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[1971] I.C.J.
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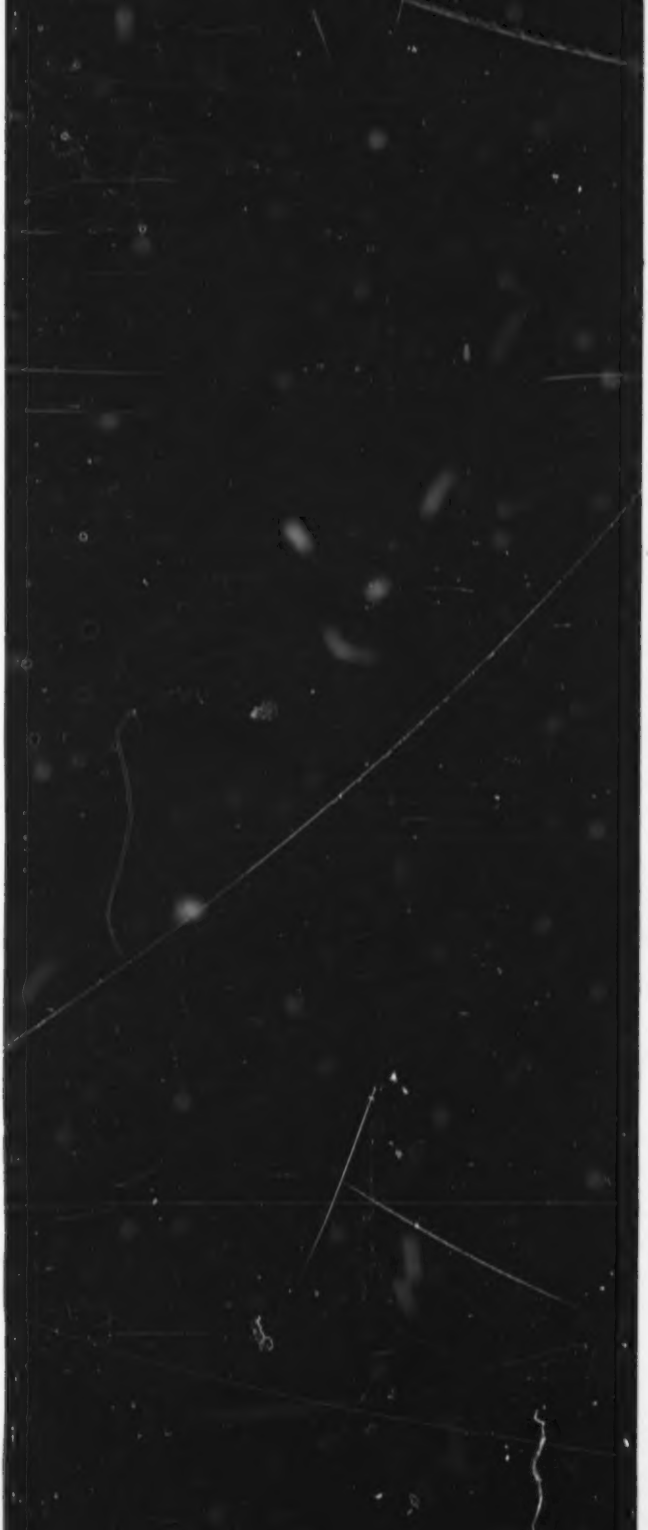

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Miller, 389 U
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Article 31
rights recogn

Article 31

To accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles and the institutions of the inter-American system, the Member States agree to dedicate every effort to achieve the following basic goals:

a) Substantial and self-sustained increase in the per capita national product;
b) Equitable distribution of national income;
c) Adequate and equitable systems of taxation;
d) Modernization of rural life and reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of undeveloped land, diversification of production; and improved processing and marketing systems for agricultural products; and the strengthening and expansion of facilities to attain these ends;
e) Accelerated and diversified industrialization, especially of capital and intermediate goods;
f) Stability in the domestic price levels, compatible with sustained economic development and the attainment of social justice;
g) Fair wages, employment opportunities, and acceptable working conditions for all;
h) Rapid eradication of illiteracy and expansion of educational opportunities for all;
i) Protection of man's potential through the extension and application of modern medical science;
j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food;
k) Adequate housing for all sectors of the population;
l) Urban conditions that offer the opportunity for a healthful, productive, and full life;

m) Promotion of private initiative and investment in harmony with action in the public sector; and
n) Expansion and diversification of exports.

Without in any way disparaging the admirable goals represented by Article 31, the court concludes that the President and the Congress did not enter into this treaty as an act of foreign relations which displaces inconsistent state law. Article 31 also should not be used by the judicial branch as a test for all state and federal statutes which touch on the subjects embraced by the Article. If signing a treaty necessarily had the effect of displacing inconsistent state and federal laws, the question of whether a treaty was self-executing and thus had the effect of domestic law would be unnecessary.

The reservation made by the Senate when ratifying the Charter supports the conclusion that it was not an act of foreign policy ousting the states' ability to interfere with the achievement of the goals established in the Charter.

> [T]he Senate gives its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.

The Charter of the Organization of American States is not a superior federal policy to which state law must yield when it impairs the policy represented by that Charter.

The court's analysis of the effect of the signing and ratification of the Charter of the United Nations proceeds along the same lines. Articles 55 and 56 of the Charter state:

> *Article 55*
>
> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, a conditions of economic and social progress a development;
b. solutions of international economic, social, healt and related problems; and international cultu and education cooperation; and
c. universal respect for, and observance of, hum rights and fundamental freedoms for all witho distinction as to race, sex, language or religion

Article 56

All Members pledge themselves to take joint a separate action in cooperation with the Organiz tion for the achievement of the purposes set forth Article 55.

The Universal Declaration of Human Rights, G. 217A, 3 U.N. Doc. A1810 (1948), was adopted unani by the U.N. General Assembly with active support a ticipation in its drafting, in 1948. The Universal Decl is considered an authoritative interpretation of Artic the U.N. Charter. Article 26 of the Universal Decl states:

1. Everyone has the right to education. Educati shall be free, at least in the elementary and fu damental stages. Elementary education shall compulsory. Technical and professional educati shall be made generally available and higher ed cation shall be equally accessible to all on the sis of merit.
2. Education shall be directed to the full dev opment of the human personality and to strengthening of respect for human rights a fundamental freedoms. It shall promote und standing, tolerance and friendship among tions, racial or religious groups, and shall furth the activities of the United Nations for the ma tenance of peace.
3. Parents have a prior right to choose the kind education that shall be given to their children

Once again, to determine whether the United Na Charter in conjunction with the Universal Declaration meant as an exercise of the power over foreign affairs useful to examine other provisions which must stand o same footing. Article 24 speaks of the right to "periodic days with pay." Article 25 establishes that

> Everyone has the right to a standard of living ade quate for the health and well-being of himself and o his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article 27(a) provides for "the right to the protection moral and material interest resulting from any scientifi erary or artistic production of which he is the author."

Like the goals set forth in the amended Charter of th ganization of American States, these are admirable p ples. They represent standards toward which all soc should strive, and, because of our relative prosperit should achieve. Holding those principles in high esteem not mean that the City of Houston could not constituti decline to provide its workers with paid vacations or th State of Texas intrudes into foreign relations if it de person the right to education. Indeed,

> As the General Assembly neared its final vote o the Declaration, Mrs. Franklin D. Roosevelt, as th Chairman of the Commission on Human Rights an a representative of the United States in the Assen bly stated:
>
> In giving our approval to the declaratic today, it is of primary importance that we kee clearly in mind the basic character of the documen It is not a treaty; it is not an international agre ment. It is not and does not purport to be a stat ment of law of of legal obligation. It is a declaratic

of basic principals of human rights and fr
be stamped with the approval of the G
sembly by formal vote of its members, a
as a common standard of achievement f
ples of all nations.

5 Whiteman, Digest of International Law 24
although the United States is obligated to pr
to education as an integral part of the "human
damental freedoms" guarded by the U.N. Cha
are not interfering with federal foreign policy
terfere with that obligation.

The plaintiffs also point to other internatio
which support their position that the right
universally recognized. The American Dec
Rights and Duties of Man, O.A.S.O.R., O.E.
23, doc. 21., Rev. 2 (English 1975); The Inte
nant on Economic, Social, and Cultural Ri
2200 A (XXI) (1966); The International Cove
Rights, O.A.S.T.S. No. 6, at 1, O.A.S.O.R.,
V/II, 23, Doc. 21, Rev. 2 (English 1975); The
the Rights of the Child, G.A.Res. 1386 (1959
rights instruments recognize the right of all
acy or to a free primary education. The plaint
the emphasis by the current administration
tional recognition of all human rights. That t
undocumented children the right to educatio
critical; it is not an impermissible interferenc
er to conduct foreign relations.

There is no recorded decision which holds
recognition of human rights, by itself, prev
from interfering with the enjoyment of th
cases on which the plaintiffs rely were reso
narrower basis.

In *Zschernig v. Miller*, 389 U.S. 429 (196
Court struck down an Oregon statute whic
non-resident's right (legal, not human) to inh
Oregon on the satisfaction of three requirem

(1) The existence of a reciprocal right of a U States citizen to take property on the same t as a citizen or inhabitant of a foreign country;

(2) The right of United States citizens to re payment here of funds from estates in a fo country; and

(3) The right of the foreign heirs to receiv proceeds of Oregon estates "without confiscati

Id. at 430-31. Superficially, this statute was an e Oregon's legitimate power to regulate descent and tion. The manner of application of the statute, hov vealed that Oregon used it as a vehicle to launch

> inquiries into the type of governments that o in particular foreign nations—whether aliens t their law have enforceable rights, whether th called "rights" are merely dispensations tu upon the whim or caprice of government offi whether the representation of counsels, ar sadors, and other representatives of foreign na is credible or made in good faith, whether th in the actual administration in the particular fo system of law any element of confiscation.

Id. at 433. This "search for the 'democracy quotien eign regime" was interference with foreign policy ditional sense: the Oregon courts used the statute the validity of foreign governments.

Similarly in *United States v. Belmont*, 301 U.S. the Court held that New York could not undermin tion a compact between the United States and Union. This principle was reaffirmed in *United Stat* 315 U.S. 203 (1941). The Court stated that the Nev icy "refuses to give effect or recognition in New Y of the Soviet Government which the United States icy of recognition agreed no longer to question." *I*

This case does not involve a state policy which the validity of a foreign government. There is no b clude that the statute is an irritant to a foreign sta

Mexico. Any conflict between section 21.(relations with Mexico is insubstantial. *Cf Social Sers. v. Dublino*, 413 U.S. 405, 42

The strongest suggestions that our in for the recognition of human rights invali which undermine the observance of those the concurring opinions in *Oyama v. C* 633 (1947). In *Oyama*, the Supreme Cou ifornia statute which prevented aliens i ship from acquiring, owning, occupying, ring agricultural land. Although the majo mention the Charter of the United Na concurring opinions referred to the tr stated:

> we have recently pledged ourselve with the United States "to promo sal respect for, and observance of, and fundamental freedoms for all v tion as to race, sex, language, or reli this nation be faithful to this interna state laws which bar land ownership by aliens on account of race are p enforced?

Id. at 649-50. Justice Murphy added that

> this nation has recently pledged itse United Nations Charter to promote observance of, human rights and fu doms for all without distinction as t guage and religion. The Alien Land a barrier to the fulfillment of that r Its inconsistency with the Charter, duly ratified and adopted by the is but one more reason why the s condemned.

Id. at 673. In answer to Justice Black's believes that we cannot fulfill our natio tions at home are inconsistent with the p

abroad, and that statutes which stand as
fillment should be condemned. Nonethel
conclude that those concurring opinions
principles which they promote provide t
ognition of justiciable rights which ser
well as condemn, inconsistent state law.

The conduct of foreign affairs in our sy
considered separately from the treaty
grown to embrace all areas that may be
ternational community. The constitution
authority to conduct foreign affairs en
speak with one voice in our dealings w
ments and international organizations. T
absence of the exercise of the power to n
the effect of domestic law, has not evo
states from enacting laws which may aff
national concern. The federal governmer
validate a state law such as the one chal
by entering into a self-executing treaty
menting legislation. That has not occurr
pledge to which Justice Black has referre
or rights by our government do not ma
treaty power irrelevant.

C. CUSTOMARY INTERNATI

In *The Paquete Habana*, the Supreme C

> International law is a part of our la
> ascertained and administered by th
> tice of appropriate jurisdiction, as
> tions of right depending upon it are
> for their determination. For this
> there is no treaty, and no controlli
> legislative act or judicial decision,
> had to the customs and usages of c
> and, as evidence of these, to the
> and commentators, who by years of
> and experience, have made thems
> well acquainted with the subjects

> treat. Such works are resort
> bunals, not for the speculation
> cerning what the law ought to
> thy evidence of what the law
>
> . . . .
>
> This review of the preceden
> the subject appears to us a
> strate that at the present da
> sent of the civilized nations o
> pendently of any express trea
> it is an established rule of int
> ed on considerations of hum
> industrious order of men, and
> nience of belligerent States,
> sels, with their implements
> and crews, unarmed, and ho
> peaceful calling of catching
> fish, are exempt from capture

175 U.S. 677, 700 (1900). The plain
treaties, agreements, declaration
construed as customary internati
rule of decision in this case.

As should be clear from the for
that the right to education, while
international goal, has not acquire
al law. This conclusion is founde
tional law.

> The traditional view of inte
> establishes substantive prin
> whether one country has wr
> of its peculiar nation-to-nati
> method for an individual to
> local remedies and then rep
> thorities of his own state to
> pion his claim in diplomacy
> tional tribunal.

Banco Nacional de Cuba v. So
(1964). In an earlier case, the Su

> In these circumstances, no q
> law, or of the extent of the
> States in its international re
> ternational law is a part of
> the law of all States of the U
> of our law for the applicatic
> and these are concerned w
> and duties and not with dor

Skiriotos v. Florida, 313 U.S. 6

Aliens may have a better cla
right to education than citizens.
ally comprehends a nation's tre
which adversely affects an alien
vene customary international l
United States is neglecting its
rights or to exert the greatest e
opportunities, an alien's gover
States to answer before an int
court, the plaintiffs have not sh
arising from customary internat

V. CONCL

The ruling of the court is not b
ties, federal legislation, or the p
tions. The immigration status
determinant. It is education th
case. Absent sufficient justificati
permit the states to deny acces
group of children within its bor
to provide public education.

It is well that the importance
gal premise for our result, for it
erations which, although not ce
to the legal analysis, confirm t
statute. The evidence introduce
that, with the hope of saving so
creating an enormous public cos
be borne in the not so distant fu

One fact remains free f
jority of the undocumente
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Edward McCarthy testifi

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> productive means fo
> into a state of crime.
> in the form of mode
> lic school operating
> cost . . . fifteen yea
> bill. . . .[123]

It is, of course, the prer
saddle the public with su
they do so in conformanc
have not done.

Another aspect of this
a country which is re-ex
home for persons of all n
forget the role that the p
unity to our community
do not fractionalize into
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tions must work to prot
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must continue to assur
public school. We must
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Our endeavor to create
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> nity, formal educatio
> insure either condit
> more and more exp
> bulwark against the
> dardization, ruthless
> threaten us today.

J. G. Gray, The Promise

challenged in this proc
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children are destined to p

These practical concern
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access to education is a
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conditions which make lif

The court will enter a
Commissioner of Educat
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The Clerk shall file th
counsel for all parties wit

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[1] In order to prom
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[2] The plaintiffs al
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would serve no pu
Texas Education A

[3] These actions w
1797, filed Septembe
filed September 27,
November 6, 1978;
tember 22, 1978.

[4] Doe v. Wright,

[5] Roe v. Holm, M

[6] Four tag-along
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Rules of Procedure
Rule 9(B), Local
Southern District
Wheeler, C.A. H-
Meyer, C.A. H-79-
C.A. H-79-1928, fi
H-79-2071, filed Oc
the Eastern Distri
Those cases are as
October 29, 1979;
1979; Doe v. Ford
Horn, TY-79-338-C
P-79-234-CA, filed
449-CA, filed Dece

[7] On December 2
this court the issu
Judicial Panel on
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F.Supp. 828 (S.D.N
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Procedure: Jurisdic
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[9]The State's moti
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Vol. XII, 2066-67.

[9]When the Judici
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were not identical

[10]The hearing in
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[11]The court origi
necessary. *See* Ma
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is appropriate. Ind
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lenged rules and
proceed as a class
nally, "[i]f the prer

a court may not deny class status because there is no 'need' for it." *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972). The court concludes that rationale should be followed in cases not subject to Rule 23(b)(3).

[12]The Mendoza children originally sought to represent a class of children in the geographic area of the Goose Creek Consolidated Independent School District. During and after the hearing in this cause, the Mendozas' counsel requested certification of a state-wide class.

[13]Tex.Educ.Code Ann. tit. 2, § 21.031 (Vernon 1972).

[14]Tex.Educ.Code Ann. tit. 2, § 15.01(b) (Vernon 1972) states that the available school fund "shall be apportioned annually to the several counties of Texas according to the scholastic population of each. . . ." Section 15.01(c) defines the term "scholastic population" as "all pupils within scholastic age enrolled in average daily attendance the next preceding scholastic year in the public elementary and high school grades of school districts within or under the jurisdiction of a county of this state." After the Texas Education Code was amended to exclude aliens who were not "legally admitted," undocumented children who were permitted to attend public schools were no longer counted in the computation of average daily attendance. Record, Vol. VIII, 300; Plaintiffs' Exhibit No. 286.

[15]The Attorney General's Opinion was based on legislative intent and a plain-meaning construction of the statute. The Attorney General stated that "the words 'every' as contained in section 21.031 of the Education Code do not permit exceptions to be created by local boards." Att'y Gen. Op. H-586 at 3 (1975). The Attorney General's Opinion also stated: "Whether the Legislature itself may establish an exception for illegal aliens has not been decided by the higher courts. While we recognize that the United States Supreme Court could sustain an exercise of legislative power, the existing case law indicates that the rights of illegal aliens are protected by 42 U.S.C.A. section 1981 and the Fourteenth Amendment to the United States Constitution." The Attorney General concluded that "[u]nder section 21.031 of the Education Code, alien children within the State are entitled to attend public school in the district of their residence, regardless of whether they may be 'legally' or 'illegally' within the United States.

Two previous Attorney Generals' Opinions have held that alien children had the same right to attend public free schools as do the children of citizens. Attorney General Opinion No. 2318, Book 55 at 338 (1921), reached that conclusion construing Articles 2899 and 2900 of the Texas Revised Civil Statutes of 1911. Those statutes contained language almost identical to that used in the Texas Education Code prior to September 1, 1975. Attorney General Opinion 0-2318 (1940) stated: "We therefore conclude that the Legislature of this State intended that an opportunity for instruction in the public schools of this State should be

afforded the youth of Texas, and the advantages of attending a public school should be extended to all children *regardless of their nationality* or color, *whether citizen or alien*; . . ." [emphasis added]

[16]Plaintiffs' Exhibit No. 448 at 5.

[17]The plaintiffs introduced as evidence a stratified random sample of the Texas Independent School Districts. Sixty school districts were randomly selected. Twenty-nine school districts were selected with a student enrollment of 10,000 or more and 31 school districts were selected with a student enrollment of less than 10,000. Of the 1,099 school districts, 59 have a student enrollment of greater than 10,000. Of the school districts contacted which had an established policy regarding the admission of undocumented children, 72.9 percent of those school districts responded that they would either exclude all undocumented children or admit them upon payment of tuition. Plaintiffs' Exhibit No. 448 at 6.

[18]The court notes, however, that there has been evidence in the Tyler Independent School District of children attending as tuition paying students. *Doe v. Plyler*, 458 F.Supp. 569, 575 & 581 (E.D.Tex. 1978).

[19]The court cannot state with absolute certainty what the Legislature intended when passing the amendment to 21.031. Neither the court nor the parties have uncovered a shred of legislative history accompanying the 1975 amendment. There was no debate in the Legislature before the amendment was passed by a voice vote. There were no studies preceding the introduction of the legislation to determine the impact that undocumented children were having on the schools or to project the fiscal implications of the amendment. This supports the conclusion that the amendment contemplated the exclusion of undocumented children from the public schools and is not merely a change in the manner of computing average daily attendance.

[20]Much has been said and written of late about whether the Supreme Court has abandoned the two-tier approach. Whether or not an "intermediate tier" is now clearly established, *see Chatham v. Jackson*, 613 F.2d 73, 80 (5th Cir. 1980), it is possible to state with some certainty that the rational basis test has become somewhat flexible. *See infra* at 44-45.

[21]In *Ambach v. Norwick*, __U.S.__, __n.7, 99 S.Ct. 1509, 1595 n.7, (1979), the Court stated that *Rodriguez* held that "access to education is not guaranteed by the Constitution." *Rodriguez*, however, did not in any way involve the issue of access to education. *Rodriguez* centered on equality of expenditure, not access.

[22]Two measurements, stock and flow, are utilized by experts to determine the population of undocumented aliens residing in the United States. The term "stock" refers to the total number of undocumented aliens who enter this country illegally and intend to remain perma-

nently, while "flow' refers to the total number of undocumente
sons who enter illegally on a yearly basis for temporary or se
employment. Dr. Gilbert Cardenas testified that it is these se
and temporary undocumented aliens who comprise the bulk of t
prehension statistics of the Immigration and Naturalization S
(I.N.S.). Many are caught within seventy-two hours after they
the United States and some will cross the border as often as t
times in one year. Record, Vol. I, at 68-71; Plaintiffs' Exhibit N
at 12-13. Additionally, Dr. Jorge Bustamante, the foremost exp
Mexican migration, testified that only nine percent of the total
undocumented aliens are likely to remain in the United States
ord, Vol. III, 426, 430-31; Defendants' Exhibit No. 14-6, Hansen
Migration, Mexican Workers in the United States and European
Workers" 108.

[23] The court heard the following testimony from Leonel J. C
formerly the Commissioner of the United States Immigratio
Naturalization Service:

> Q. You indicated a little earlier on that you felt that in esse
> United States had already granted an amnesty to undocu
> persons in the United States. Could you expand on that t
> a little, please?
>
> A. What I said was that there is a de facto amnesty, certainly
> official policy. But when you contend with immigration an
> mentation in the state of New Mexico with three investi
> for the entire state, you have to come to the conclusion th
> are not going to deport everybody in New Mexico who c
> deported. That's what I mean by the de facto situation. F
> when the number of investigators is reduced by one-tenth
> year's budget, you have to come to the conclusion that it s
> be a de facto situation, but the efforts to root them out ar
> to be much more difficult.

Record, Vol. VI, 49-50. The Court notes that Congress recen
authorized additional personnel for I.N.S. It is doubtful that th
plement would alter Mr. Castillo's assessment.

[24] In *Doe v. Plyler*, 458 F.Supp. 569, 581 n.14 (E.D.Tex. 1978)
Justice stated:

> It is no answer to the *Rodriguez* dictum that the ability
> illegal alien children to exercise free speech and participa
> in the political process is of no concern to the State of Texa
> These children, and many more like them, are likely to r
> main here. . . . The federal government has chosen, eith
> by act or omission, not to deport them. Many of them ha
> younger siblings who are American citizens and who m
> some day be the means of legalizing the presence of t

whole family. Developments in federal immigration policy, such as President Carter's proposed amnesty plan, may legalize their status at a much earlier date. As the Supreme Court has recognized, the benefits of education are not reserved to those whose productive utilization of them is a certainty: "[a]lthough an alien may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role in other areas of import to the community." *Nyquist v. Mauclet*, 432 U.S. 1, 12, 97 S.Ct. 2120, 2127, 53 L.Ed.2d 63 (1977).

[25] A student commentator has stated that

> The "entry" doctrine . . . [is] understandable only as a way to balance important competing policies—the constitutional guarantee of due process to all "persons" within its jurisdiction versus the constitutional commitment to Congress of foreign policy and the related admission of foreign nationals to the United States shores. Thus, the Court has not allowed Congress arbitrarily to deprive resident aliens of life, liberty, or property. The Court has deferred to congressional decisions on the conditions which trigger expulsion of an unnaturalized alien, but has required procedural due process in deportation. This combination of policies strikes a balance between the Court's acknowledging the congressional right to set terms of admission and expulsion, and fulfilling its own responsibility to insure fundamental fairness to any person within the shelter of the Constitution. Finally, the Court has abdicated entirely when Congress excludes an alien still at the threshhold or its legal equivalent *i.e.*, parole, and has justified the fictional entry doctrine as a device which allows Congress to be humane in emergencies (medical or political) and to release excludable aliens from custody without losing any flexibility in deciding whom to admit. In sum, the Constitution, in particular the fifth and fourteenth amendments, protects those within American territory. The Court usually sanctions dilution of those guarantees only to the extent necessary to preserve congessional control over the admission and expulsion of foreign nationals.

Comment, 16 Hou.L.Rev. 667, 706 (1979).

[26] Record, Vol. VII, 98-142.

[27] Record, Vol. V, 687.

[28] Record, Vol. VII, 156.

[29] Record, Vol. VI, 12-16; Vol. VII, 155.

[30] Record, Vol. VII, 105-09.

[31] Record, Vol. IV, 594.
[32] *Id.* at 612.
[33] Record, Vol. XI, 1256-68. *See Also* Plaintiffs' Exh
[34] Record, Vol. II, 222. In addition Dr. Carter's testi

> [W]e can very well say with perhaps a few indivi
> tions that [an excluded] child would be illiterate
> unable to read and unable to write. The child
> miss much of the . . . social training relative t
> the customs, the procedures, the organization
> ciety; that aspect of the formal [socialization] c
> would be missing. [These children] would prob
> able, with the lack of these skills, to integrate
> into the society as productive members of societ
> sibility of an illiterate person [growing] up and
> at anything but marginal social levels in this soc
> trial, technically advanced society is very hard
> He or she would be unable to complete the mos
> tary forms of application for work, which would
> individual to those kinds of jobs that would requi
> ing, etc. As you know, these kinds of jobs are di
> in our society. Cognatively, the child would be
> to cope with modern industrial society. *Id.* at 22

[35] Record, Vol. II, 287-89. *See also* Record, Vol. VI
[36] Record, Vol. X, 1171-75.
[37] Plaintiffs' Exhibit No. 288. *See generally* Record,
1179, 1180-81 & 1184-87.
[38] Professor Tribe has described the right to fair an
sentation as a qualitative aspect of the right to vote.
can Constitutional Law § 13-7 (1978). The court, h
that apportionment schemes which cancel or minimize
of cognizable population groups elicit strict scrutiny o
ture of the population group compels it. Thus racial a
by themselves deserve special solicitude without
qualitative aspect of the right to vote. *Compare Gaffn*
412 U.S. 735 (1973), *with White v. Register*, 412 U.S.
[39] The statute excludes alien children who are
mitted." This expression, perhaps as a result of the
plexity of our immigration laws, is a monument t
Texas Education Agency, however, has promulgated
implementation of section 21.031 in Rule 26.51.01.010
February 29, 1980.
[40] The court notes that undocumented status is no
which an individual cannot control. Uncontrollable c
those which bear no "relationship to individual respo

doing." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 1
though undocumented persons may be powerless to c
diately their status *to* that of a resident alien or that of a
United States, undocumented *adults* have control and
sponsibility for their present status. Further, citizens an
iens may be distinguished for undocumented aliens with
ing them. A distinction should not be stigmatizing wh
difficult to make the distinction required without referenc
acteristic giving rise to that distinction. Describing pe
documents as undocumented or illegal does not constitute
stereotyping which relegates those described to inferiori
ally Regents of the Univ. of Cal. v. Bakke, 438 U.S. 2
(Brennan, White, Marshall & Blackmun, JJ., concurrin
in part and dissenting). Otherwise, any classificatory sch
scribes persons in an undesirable way would be suspect
ernments restrained in their ability to regulate.

[41] In *United States v. Carolene Products Co.*, 304 U.
Justice Stone's now well-known fourth footnote sugge
crimination "against discrete and insular minorities ma
condition, which tends seriously to curtail the operation
cal processes ordinarily to be relied upon to protect m
which may call for a correspondingly more searching ju

[42] In *Matthews v. Diaz*, 426 U.S. 67, 80 (1976) the S
stated that illegal entrants do not have "a colorable
claim" to benefits provided to citizens by the federal gov
Court reasoned that the control of immigration and nat
Congress permitted flexibility in establishing the condit
sion. This does not imply that the states have co-equal
can impose burdens on persons whom the federal gover
or permits to remain in this country. States may exclu
offices or functions to protect the basic concept of a po
nity. *Ambach v. Norwick*, __U.S.__, 99 S.Ct. 1589 (1
Connellie, 435 U.S. 291 (1978); *Sugarman v. Dougall*,
(1973).

[43] The Supreme Court has construed the due proces
quiring equal protection of the laws. *Bolling v. Sharpe*
(1954). The application of the guarantee of equal protec
differs when classifications are created by the state an
ernments. Thus,

> The federal sovereign, like the State, must gove
> tially. The concept of equal justice under law is s
> the Fifth Amendment's guarantee of due process,
> by the Equal Protection Clause of the Fourteenth
> ment. Although both Amendments require the s
> of analysis, see Buckley v. Valeo, 424 U.S. 1 (1

> Court of Appeals correctly stated that t
> are not always co-extensive. Not only do
> the two Amendments differ, but more
> may be overriding national interests whi
> federal legislation that would be unacce
> vidual State. On the other hand, when a
> plicable only to a limited territory, such
> Columbia, or an insular possession, and
> special national interest involved, the D
> has been construed as having the same
> Equal Protection Clause.

Hampton v. Mow Sun Wong, 426 U.S. 88, 100

"Judicial deference to federally created dist
is due in part to the political character of the
Fong Yue Ting v. United States, 149 U.S. 698
tion does not render "federal power over alie
any agent of the National Government may ar
dent aliens to different substantive rules
citizens." *Hampton v. Mow Sun Wong, sup*

[45] This conclusion is bolstered by the court's
Bica, 424 U.S. 351 (1976). *De Canas* held th
power to regulate immigration did not pre-e
prohibiting employment of undocumented pe
nas did not involve the applicability of the eq
undocumented persons, "[t]he Court used eq
ogy to find that protection of the state's lawf
and economy were 'vital state interests,' and
'tailored to combat effectively the perceived
Rev. 1069, 1081 (1979). If the Court's findings
protection context, they would refute the cont
documented persons is suspect.

[46] A student note has suggested that the app
cess clause is not a basis to infer that undoc
tected by the equal protection clause.

> Under due process of law certain indivi
> tected from unfair or mistaken depriv
> where minimum procedural safeguards
> Under equal protection of the laws in
> protected from arbitrary deprivation by
> legitimate state purpose is found to be a
> thereby. The difference in focus betwe
> equal protection inquiries demands caut
> equal protection guarantees through th
> isting due process rights, particularly
> addressing the issue with regard to a gr

> in this country is contrary to laws promul
> thority of the Constitution. Due process ri
> aliens to insure they are not deprived of in
> erty or property without adequate proced
> Such constitutional guarantees do not au
> rise to a like result for the protection of i
> titlement to state benefits under equal p
> laws.

Note, 11 St. Mary's L.J., 549, 562-63 (1979). I
court would extend equal protection guarantees
of pre-existing due process rights . . .," nor sug
tees of due process "automatically give rise to
illegal aliens' entitlement to state benefits. . . ."
tinctions between the two clauses should not b
that are safeguarded but on the persons protect
The due process clause protects certain kinds
those that inhere in the right to life, liberty, o
protection clause guarantees equal treatment
the absence of sufficient justification. Neither t
guarantees equal treatment by the government
cient justification. Neither the due process clau
nor the equal protection clause creates substant
cal to argue that the rights protected by the due
not determine which persons are protected by
clause. Analysis which focuses on the rights
provisions sorely misapprehends the issue w
aliens are protected by the equal protection clau

[47] The equal protection clause may not prohibit
non-residents or against non-resident aliens. *Se*
389 U.S. 429, 459 n.26 (1968) (Harlan, J., conc
Clung, 172 U.S. 239, 260-61 (1899). Such discrim
be unconstitutional because of other constitutio
the privileges and immunities clause, the power
commerce, and the foreign relations power.

[48] A recent interpretation of a civil rights statu
sition that the equal protection clause protects
In *United States v. Otherson*, 480 F.Supp. 1369
**United States Border Patrol Agents were pr
mistreating and assaulting several undocumer**
held that the undocumented aliens were "inh
Territory, or District" within the meaning of
court reasoned that the term "inhabitants" is sy
pression "any person within the jurisdiction." A
legislative history of the Reconstruction civil
fourteenth amendment reveals that Congress i

civil rights of any person within th
congruous for an undocumented alie
statute based on the equal protect
amendment, and yet not be covered
the clause itself. *Otherson* along wi
documented aliens are protected by
ple justification for maintaining the
42 U.S.C. §§ 1981 & 1983 and 28 U.

[49] Defendants' Exhibit No. 6-1 at

[50] *See* Plaintiffs' Exhibit No. 448.

[51] Plaintiffs' Exhibit No. 448.

[52] Plaintiffs' Exhibit No. 207 at 70.

[53] Plaintiffs' Exhibit No. 210 at 35.

[54] Plaintiffs' Exhibit No. 12 at 25.

[55] Record, Vol. I, 80-83; Vol. III, 4
Plaintiffs' Exhibit No. 207 at 6-7. T
that "aliens, like citizens, must pay
Diaz, 426 U.S. 67, 83 n.22 (1976).
mented persons should pay tuition
costs of education is nonsense. *See*
365, 376 (1971) ("There can be no 's
nues to which aliens have contribut
dents of the state.")

[56] *See supra* 25-27.

[57] Although the state does not mo
that those who cannot afford the tui
can turn to the private schools. *See*

[58] Illegal entry is a misdemeanor f
for subsequent commissions. 8 U.S.
alien is a felony. 8 U.S.C. § 1326.

[59] Record, Vol. VII, 1-33; Plaintiff

[60] Record, Vol. VII, 49-50.

[61] Record, Vol. XI, 1272-73, 128
hibit No. 3 at 259-60.

[62] Record, Vol. XI, 1274.

[63] Plaintiff-Intervenor's Exhibit
Raul Besteiro, the Superintendent
testified that the problems his sch
result of an influx of documented c
of financing education in Texas, his
sufficient classroom space.

[64] Tex.Educ.Code Ann. § 16.004
2062-67.

[65] Record, Vol. X, 1217. *See Arre*
(S.D.Tex. 1979).

[66]As noted above, some school distr
undocumented children prior to 1975.

[67]Record, Vol. XXI, 86; Vol. III, 471.

[68]*See* Defendant's Exhibit No. 2-1.

[69]*See* Record, Vol. XIII, 2297-98. *See*
which shows an undocumented popula
128,340 while Defendants' Exhibit No.
Hispanic population in 1980 of 111,284.

[70]Record, Vol. XXI, 56, 87, 95, 102-03

[71]Plaintiff's Exhibit No. 443. This re
because application of Criterion's meth
residual of only 71,004. It is rather ab
sidual greater than the combined resi
blacks.

[72]This is a result of the methodology
two independent data bases: one for the
17; and one for TEA enrollment data. A
rion study simply increased the census
tion to the increases found in annual T
Vol. XVII, 97. This necessarily resulte
tern of "residual" difference that existe
ord, Vol. XXI, 93-94. Thus, the numbe
children" simply increases in proporti
school enrollment.

[73]*See* Record, Vol. XXI, 64; Plaintiffs

[74]Record, Vol. XXI, 66, 131, 134.

[75]Record, Vol. XVI, 65, 69.

[76]Record, Vol. XXI, 72, 102-03, 136.
census enrollment data and shows that
glos, and 55,969 Blacks are out of scho
adjusts TEA data to exclude students
comparable with the census data. This
sidual of 119,884 and a Black and Anglo

[77]Record, Vol. XX, 31; Vol. XVIII, 3
30.

[78]See Record, Vol. XXI, 101; Vol. X
No. 400, 418 & 442.

[79]Record, Vol. XXI, 56. This may be
ducted the study was not a demographe

[80]The court does not suggest that any
accurate. It is noteworthy that
"Hispanics" differently. Record, Vol
not surprising that they resulted in di

[81]Record, Vol. XVIII, 177.

[82]Record, Vol. XXI, 115.

[53] Record, Vol. III, 421
at 142-43 (Villalpando St
entire San Diego School
at 25-26 (Cornelius Stud
ican nationals reside per
length of stay being 5.5 m
nelius—of those who sta
with them); Defendant
Study—of those undocu
manently in the United
children); Defendant's
total undocumented imm
stock, only 3.7 percent h
No. 14-19 at 10-11; (U
documented people inte
children enrolled in sch
children whose parents
greater. The Van Arsd
who are citizens; the
General shows that 6.6
have children in schools
children are counted.

[54] The legislative histo
implies that the State i
migration. The sponsor
would serve "to make it
Mexico to attend schools
meeting, hearing on HR
likely that similar conce

[55] Record, Vol. III, 42

[56] Record, Vol. I, 104-

[57] The State has sugg
§ 42800, *et seq.*, inhibit
Prior to July 1, 1978,
public instruction to ad
perintendents to list un
submit the list to the bo
quired to forward the li
vice. That law was ame
not currently required t
mented children are en

[58] If the State was ger
illegal immigration or i
tion, a law sanctioning
would do very nicely. L

[89] Record, Vol. XVI, 3511,
ment of the problem shoul
mented children were, for t
been thrown out and the St
them back aboard.

[90] Record, Vol. XXIV, 78-7

[91] Plaintiffs' Exhibit No. 20

[92] Record, Vol. XXIII, 8-9;

[93] Record, Vol. X, 1113; V
204 at 14-15. *See also* Plaint
tive purposes).

[94] Record, Vol. XX, 118-19

[95] Record, Vol. XXIII, 15
the Comptroller's estimate
Record, Vol. XIII, 2252-53.

[96] Record, Vol. XIII, 225
$1,200.00 and $800.00 is ac
which are appropriated as s
the "regular program," but
tory, special and vocational e
gram funds, categorical fun
eral Revenue Fund.

[97] One witness stated: "Fo
the foundation program is p
not recognize the municipal
trict, the water district, th
must be delivered." Record,

[98] Record, Vol. VIII, 170-8

[99] Plaintiff-Intervenor's Ex

[100] Record, Vol. IX, 1046.

[101] The Supreme Court sta
633 (1969), that

> We recognize that a St
> the fiscal integrity of i
> tempt to limit its exp
> tance, public educatio
> may not accomplish su
> between classes of its c
> duce expenditures for
> dren from its schools.

The State contends that u
equal protection under the
tion against undocumented c
ination if founded on bad re

State would rea
the word "citize
[102] In discussi
stated:

> The state i
> riding" [*M*
> *Loving v.*
> *Graham v*
> tant, *Dun*
> stantial,"
> these vari

In Re Griffiths,
[103] The childre
It is important
of the undocum
plaintiffs is und
fied that it is
Service to initi
[104] Like resid
likely to need
undocumented
Plyler, 458 F.S
viously have at
[105] The court
propriate becau
vidual responsi
proach, the me
the achievemer
tionship betwe
pricious and ir
tionality is app
[106] *See Hosie*
excludes undoc
tion clause). *C*
(E.D.La. 1961
cludes childre
irrational).
[107] States are
subject to exclu
667, 693 (1979)
the State from
late; exclusive
federal author
does not pre-e

cordingly, ". . . stat
eral government by
will be totally void
emption, however,
emption implies the
Federal Pre-emptio
to a Public Educatio
(1979).

[108] An examinatio
strates that Congre
islation. To the co
retary of Educatio
program and disbu
which do not compl
& 2836. *See* R. Katz

[109] Record, Vol. I

[110] *Id.* at 1019.

[111] *Id.* at 1013, 10

[112] Defendants' E

[113] Record, Vol. I

[114] *Id.* at 1077.

[115] For a detailed
state's migrant edu
Federal Register, F
grant child is eligib
I Migrant services
"formerly migrator
tory child is a child
within the past yea
agricultural or fishi
who was considere
Record, Vol. IX, 1

[116] Record, Vol. I
ceives more Title I
migrant children ha
appropriation of al
will be allotted to
this money.

[117] The contrary
Marshall, joined by
Services v. Dublin

> It is unnecess
> analysis of t
> does, . . . tha
> tion of preem

> by Congress preclude state attempts to regulate the same subject? There is no question that New York may impose whatever work requirements it wishes, consistent only with constitutional limitation, when it gives public assistance solely from state funds. . . . The question here relates to the conditions that Congress has placed on state programs supported by federal funds. The distinction is not without importance, for it makes inapposite the strictures in our earlier cases and relied on by the court, against lightly interfering with state programs. For we must, of course, be cautious when we prevent a State from regulating in an area where, in the absence of congressional action, it has important interest. Holding that the Federal WIN Program is the exclusive method of imposing work requirements in conjunction with federally-funded programs of public assistance would have no such impact; New York would remain free to operate public assistance programs with state funds, with whatever work requirements it chose.

Even if this dissent was adopted by the Supreme Court, and administrative reconciliation was found not to be preferable to judicial application of pre-emption doctrine, this case is distinguishable. The classic question of pre-emption also is not presented here. Title I is not a federal program which can exist independently of state educational programs. Section 21.031, however, was not promulgated as part of the implementation of the federal legislative scheme. *See id.* at 411 n.9 (opinion of the Court). AFDC, like Title I, is a voluntary program. *See* 42 U.S.C. § 601. A state may choose not to participate in order to avoid federal requirements. Title I, however, unlike AFDC, serves to supplement existing state programs rather than to create ones that are jointly financed. States did not create school systems in order to benefit from Title I. Prior to 1935, support of dependent children was not provided by many states. For example, prior to 1935, the Texas Constitution prohibited the Texas Legislature from granting public money to any individual except indigent and disabled confederate soldiers and sailors and their widows or in the event of a public calamity. Tex. Const. art. 3, § 51. When the federal government enacted the Social Security Act in 1935, the State Constitution was amended. Subsequently, in 1937, the Texas Constitution was amended to authorize subsistence for needy children. *Id.* at § 51(a)(3).

[118] In the pretrial order, the plaintiffs also argued that section 21.031 was pre-empted by the Immigration and Naturalization Act. That issue of law was not addressed in the plaintiffs' final arguments or in their post-trial briefs. In the event that the plaintiffs continue to urge pre-emption on this basis, the court notes that the Immigration and

Naturalization Act does not pre-empt the State law. Except insofar as the statute intends to inhibit immigration, *supra* at 53, it is not an exercise of an exclusive federal power and it is not state legislation in a field occupied by congressional legislation. Further, it stands as no conflict to the federal scheme to deny admission and to deport or to require the voluntary departure of those without documents. If there is a congressional purpose to allow undocumented aliens to enjoy the same benefits as resident aliens while the former are here clandestinely, or not to seek the deportation of children, that purpose is not expressed in a specific provision of federal law. *Jefferson v. Hackney*, 406 U.S. 535 (1972). *See* Note, 14 Tex. Int'l L.J. 289, 297-98 (1979). Moreover, the State's regulations demonstrate efforts to remove any conflict between the state statute and the federal scheme by using federal immigration documents to identify those who are "legally admitted." *See* R.Katz & H.Lenard, The Demise of the Implied Federal Preemption Doctrine, 4 Hastings Const.L.Q. 295, 316 (1977). The use of categories created by federal law may remove the conflict between the state and federal law, but when immigration categories are used, it may be unlikely that those categories are related to a permissible state interest in the context of an equal protection challenge.

[119]The court is aware of other problems with the plaintiffs' position that Article 47 is supreme domestic law. Having reached the conclusion that Article 47 is a non self-executing treaty provision, it is unnecessary to discuss such issues as the effect of the "Brickerlike" reservation made by the Senate at the time of ratification and whether the United States may legislate in the are of human rights through the exercise of the treaty power.

[120]A similar argument was first made by the United States in their briefs in *Shelley v. Kraemer*, 334 U.S. 1 (1948). The government contended that Articles 55 and 56 of the United Nations' Charter, although non self-executing, represented the public policy of the United States. The Supreme Court did not address that argument in their opinion. *See* Note, 36 Va.L.Rev. 1059, 1080 (1950).

[121] For a concise and engrossing description of this trend, *see* E. Murphy, Children of the Eighth Day: The Role of International Lawyers in a Post-Modern World, 13 Int'l. Law. 681, 684-85. The change of emphasis from the nation-state to a broader transnational community is perhaps best illustrated by the difference between the Charter of the League of Nations which emphasizes "the equality and sovereignty of nations" and the Charter of the United Nations which purports to subject nations to a supranational authority.

[122] *See also* S. Bleicher, The Legal Significance of Re-Citation of General Assembly Resolutions, 63 Am.J.Int'l L. 444, 449 (1961) ("According to standard definitions a customary rule comes into existence only when there are acts of states in conformity with it, coupled with a

belief that those acts are required by international law.") (
omitted).

[121] Record, Vol. VII, 124-25.